DOCTRINE OF SOVEREIGN IMMUNITY IN INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO INDIAN LAW AND PRACTICE

THESIS SUBMITTED TO THE UNIVERSITY OF ALLAHABAD FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN POLITICAL SCIENCE

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CERTIFICATE

This is to certify that the present thesis entitled "Doctrine of Sovereign Immunity in International Law: with Special Reference to Indian Law and Practice" submitted to the University of Allahabad for the Degree of Doctor of Philosophy in Political Science Department is an original bonafide research work carried out by Mr. Rajiv K. Gupta under my supervision.

H. M. Jain

Allahabad

Dr. H. M. Jain

Dedicated To

The memory of my beloved father

Late Shri Sheo Raj Singh Gupta

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PREFACE AND ACKNOWLEDGEMENTS

"Age cannot wither nor custom stale her infinite variety" is the immortal Shakespearean reference about Cleopatra which fits in very aptly to the status of concept of sovereign immunity in international law. Gone are the days of rule of Kings and Queens, fighting wars with swords and sending messages through trained pigeons. World has switched over to democratic governance and wars are fought through long arms of the powerful military through intercontinental ballistic missiles and informations are exchanged through Internet. Activities on outer space and cyberspace control this little planet, yet old principles of grapevine character ever occupy a prominent place in international politics and international relations. One such principle is the principle of sovereign immunity, a principle which can be traced back to the origin of state system and its evolutionary imprints are traceable in all the countries.

As a student of Master's degree in Political Science in the University of Allahabad and later as a teacher during my UGC research fellowship for a short stint of time, the concept of sovereign immunity fancied me. I find that this traditional principle has undergone far more radical change during the last five decades than it had been subjected to for the last five hundred years. This excited me to a great extent when I

began my initial research during 1984. But joining the Indian Administrative Service in 1986 postponed the fulfillment of my heartfelt desire. The pressures of field job as a District Collector almost consecutively in three districts, for many years, predominated, though unsuccessfully against my perseverance to complete my research.

There were times of despair. On these occasions it was my beloved late father Shri Sheo Raj Singh Gupta and my mother-in-law Dr. (Mrs.) Vidya Verma who rekindled my sprits to step-up my initiatives. And almost simultaneously my teacher and guide Dr. H.M. Jain extended me unstinted support, through his scholarly dispositions and patiently clarified many of my doubts on the subject-matter of the work. The Head of the Department of Political Science Dr. U.K. Tiwari infused me with unbeatable confidence to complete this work. I remain thankful to these noble minds.

The collection of research materials required me to visit a number of libraries. These include: main library of Allahabad University; Law Department library in Allahabad University; High Court library at Allahabad; Supreme Court library at New Delhi; Indian Society of International Law Library, New Delhi; Jawaharlal Nehru University Library, New Delhi; Law Department Library at Sachivalaya, Gandhinagar; M.S. University Library, Vadodara; British Council Library,

Ahmedabad; United States Information Service Center at Bombay and New Delhi; Embassies and High Commission of USA, UK, Australia and Canada at New Delhi. I thank the administration and the librarians of these institutions for having provided me access to their valuable and relevant materials for my research work.

I remain grateful to my dear friends Dr. M. Gandhi (Ministry of External Affairs, New Delhi) and Mr. Vidjea Bharathy (Asian-African Legal Consultative Committee, New Delhi) whose timely intellectual help and support enabled me to stock-take the latest developments in the field of international law of sovereign immunity. I also sincerely thank the senior officials in the Protocol Division of the Ministry of External Affairs for giving me interview. The discussion I had with them provided me with necessary insights into the practical aspects of consent procedure under Sec.86 of CPC.

I will be failing in my duty if I do not acknowledge the emotional support I received instantaneously from my mother Smt. Prakash Devi, my wife Smt. Namrata Rajiv, and my children Aishwarya and Rajas. I was lucky to have Justice S.C. Verma as my father-in-law who was the first critic of my ideas and his suggestions rewarded me amply to accomplish my task.

I thank all my friends who have extended help readily to accomplish this work, notably, Dr.Kuldeep Grover in the usage of computers and access to Internet. I am also thankful to Shri Dinesh Verma and Shri P.T. Abraham who have untiringly spent hours on computers, typing and editing my thesis.

I am indebted to the core of my heart to the Almighty who provided me with spiritual strength in progressive realization of this worthy goal. However, it goes without saying that the errors which this work contains despite all the help I received, are mine.

Allahabad Rajiv K. Gupta

TABLE OF CASES

IMPORTANT ABBREVIATIONS

A.C.	Appeal Cases
A.D.	Annual Digest and Report of Public International Law Cases
AJIL	American Journal of International Law
ALJ	Allahabad Law Journal
All	Allahabad
All ER	All England Law Reports
Bom.	Bombay
BYIL	British Yearbook of International Law
C.A.	Court of Appeal
Can. Y.B. Int. L.	Canadian Yearbook of International Law
Ch. (or Ch. D.)	Chancery Division of the English High Court of Justice
Cir.	Circuit
Colum. J.Transnat'l L.	Columbia Journal of Transnational Law
CSIA	Canadian Sovereign Immunity Act
F. (or Fed.)	Federal Reporter
F. 2d	Federal Reporter (Second Series)
F. Supp.	Federal Supplement
FSIA	Foreign Sovereign Immunity Act
Harv. ILJ	Harvard International Law Journal
HCOC	High Court Original Cases
HR	House of Representatives
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILM	International Legal Materials
ILR	International Law Reports
ILR	Indian Law Reports
K.B.	King's Bench Division of the English High Court of Justice

LRP	Law Reports Punjab
NILR	Netherlands International Law Review
NWP	North Western Provinces Reporter
NYIL	Netherlands Yearbook of International Law
P. (or P.D.)	Probate, Divorce and Admiralty Division of the English High Court of Justice
PR	Patna / Punjab Reports
PUN Re.	Punjab Records
Q.B.	Queen's Bench Division of the English High Court of Justice
S. Ct.	Supreme Court
SALJ	South African Law Journal
SIA	State Immunity Act
Times L.R.	Times Law Reports
UNGA Res.	United Nations General Assembly Resolution
UNTS	United Nations Treaty Series
U.S.	United States Supreme Court Reports
Vanderbilt J. Transn'l L.	Vanderbilt Journal of Transnational Law
Virginia JIL	Virginia Journal of International Law
W.L.R.	Weekly Law Reports
YBILC	Yearbook of the International Law Commission

CHAPTER I

GENERAL INTRODUCTION:

STATEMENT OF PROBLEM; OBJECT; METHODOLOGY AND THE SCOPE OF THE STUDY.

Problem

The concept of sovereign immunity as a universally accepted principle plays an important role in the international intercourse between states and is generally accepted to have become a part of customary international law. The scope and content of this concept is best understood in the backdrop of a particular time frame and on the ruling political philosophy of that time. The form of government such as monarchy, aristocracy and democracy also plays a vital role in the determination of the scope and content of this concept. In a system where affairs of the government are conducted by monarchs sovereignty was associated with kingship and consequently sovereign immunity has been viewed more as a personalized concept and the King as a foreign sovereign enjoyed sovereign immunity in the territory of a host State.

The scenario became complicated due to the colonization where sovereigns of different hierarchy were brought under the scope of sovereign immunity. Conversely, countries which were free from colonial influence either as a colonizer or as a colony, had evolved a

distinct practice of sovereign immunity than countries which had colonies, and as the colonial masters had created a hierarchy and allowed immunity only to the personal sovereigns and not to the Princely States, or the colonial entities.

The transformation of the political system from monarchy to democracy and acceptance of socialist form of government and the co-existence of all such diverse political systems and the conduct of relations between them engendered a new thinking that the issue of immunity should address not to the status of the person but to a set of activities called "sovereign acts" which are performed by any form of government.

As long as the concept was conceived as a personalised one, the questions such as who is the foreign sovereign and whether he is entitled to claim sovereign immunity in the host country had been decided by the executive of the host country. When sovereign immunities are determined on the basis of the activities of the government in question it became a complex issue.

In so far as activities which are not "governmental acts" in the traditional sense of the term, doubts have arisen in regard to the acceptability of the claim of immunity. However, the legal disputes arising out of commercial activities linking foreign government as one party and the citizen of the host country as the other party, it was the judiciary, and not the executive of the host country, which tended to

decide the dispute in accordance with customary international law as understood by it. Thus, the courts were presented with the problem of interpreting customary law of sovereign immunity in response to socio-economic and political demands of the time.

International law interpreted by municipal courts resulted in myriad judicial pronouncements chequered by the influence of the legal system in which they rendered their decision. The decisions of the courts in the continental system reveal the scope and content of the concept of sovereign immunity more differently than the courts in the common law system.

Countries, belonging to the civil law traditions, unlike the common law countries, classified the sovereign and non-sovereign acts and distinctly spelt them out either through the statute or by judicial pronouncements. This proved more effective in their legal system which gave pre-eminence to statutory law than to the judicial precedent.

The juridical techniques, which varied from one state to another is another reason for conflicting decisions. After all, law is and has been, increasingly developed by experience. This has been true with regard to common law doctrine of sovereign immunity also. When change occurred politically and economically in common law countries, the new demands prompted by them required the common law to learn from the approach of the civil law systems.

Yet, common law being basically a judge made law had an inherent difficulty in modifying the existing law at a quicker pace in response to the social needs of the time. Its development was highly dependent upon cases to be brought before the courts on the question of sovereign immunity. Unlike legislative rule making in this subject matter which is instant and forthright, the judicial rule making travelled a zigzag. States, therefore, realized the importance of codification of sovereign immunity in the light of the efficiency evidenced in the civil law system which enabled the adoption of legal rules at a faster pace, with greater diversification based on socio-economic and political realities prevailing in the particular country. Common law countries followed suit. Though the law of sovereign immunity and privileges under common law today has its infinite variety, yet, certain identifiable commonalities exhibited by the decisions of municipal courts in this system had later been profitably used to delineate the scope, content and limitations of sovereign immunity before its codification.

From this background, should proceed an inquiry into certain basics of sovereign immunity prevailing in common law system, especially the principles evolved under British common law have served as binding precedents in India and have greatly influenced the later developments of law in this field.

A critical study of sovereign immunity in India has been attempted in prospect and in retrospect. A study in retrospect give an

idea as to how the doctrine of sovereign immunity had been developed in other common law countries from the core concept which we and they have inherited and how by later codifications developed their law in response to the socio-economic and political necessities and demands. Besides the codification at the national level the work has to take stock of the contemporary international law of sovereign immunity which every court in common law countries has to re-visit when they wish to mould the law in response to changing needs, without undermining established principles of international law. After all, national courts interpret matters of sovereign immunity only in the light of principles of international law as understood by them.

Methodology

Unlike other principles of international law, the principles concerning sovereign immunity have a dual character, viz. the principles evolved through common law courts and the principles adopted by way of codification in response to the changing needs of socio-economic and political conditions prevailing in the polity. Although one supplements the other, the need for the second becomes essential due to the technical inadequacy of the judicial system to cope up with new demands without losing time. The codification that had taken place regionally and internationally assimilated both the legislation and judge made law in removing possible ambiguities. An

examination of this complex system of codification required the study of authoritative judicial precedents and statutes as primary sources from many prominent common law countries such as United Kingdom, United States of America, Canada, Australia, South Africa and Pakistan. Similarly, the study on the effect of codification of law of sovereign immunity from the national, regional and international perspective necessitated an examination of primary sources such as the Sovereign Immunities Act of Britain, Foreign Sovereign Immunities Act of USA and similar statutes in Canada, Australia, South Africa and Pakistan and the appropriate case laws decided since codification.

The study of European Convention on Sovereign Immunities and the draft articles of International Law Commission cast a duty of looking to primary sources of international law such as international customs, treaties and general principles of international law. The opinions of the highly qualified publicists are also carefully collected to evaluate the status of law in a more scientific and scholarly manner. The present work seeks to explain the intricate aspects of reception of the doctrine of sovereign immunity and its scope and development in the contemporary settings which is the important referral point to assess the doctrine of sovereign immunity under Indian law.

The doctrine of sovereign immunity in India has been viewed from the historical and the colonial perspective, more particularly, where it diverged from the practice in United Kingdom. The changes

brought in this regard by the statute have also been the subject matter of the present study. The decisional materials of the courts in India concerning former Rulers have been carefully analyzed and the behaviour of courts on this important matter has also been studied in the time period before and after India became an independent State under a Republican Constitution.

Scope of the study

This work entitled *Doctrine of Sovereign Immunity in International Law with special reference to Indian law and practice* is an attempt to unravel the intricate aspects of the concept of sovereign immunity in international law and its application in India. The work is divided into three parts and dealt with in VIII Chapters.

Part I of this work deals with an introduction to sovereign immunity covering various theories of sovereign immunity, and the two prominent views of the doctrine of sovereign immunity, namely, the absolute view and the restrictive view.

Chapter II deals with a study of the common law concept of sovereign immunity as perceived principally by the Anglo-American courts. It delves deep into authoritative precedents of Anglo-American courts. The reception of absolute and restrictive views of sovereign immunity in common law courts and the shift in judicial attitude from the absolute to the restrictive view has been under focus. It also discusses the whole gamut of issues concerning the application of

sovereign immunity to actions on title, actions relating to subject matter in possession of a foreign sovereign, actions relating to subject matter in the control of a foreign sovereign, immunities of government instrumentalities and executive suggestions. A separate segment dealing with waiver and execution, both in the United Kingdom and in the United States also forms part of this Chapter.

Part II of the work deals elaborately with the codification of law relating to sovereign immunity. The term 'codification' has been used here in the sense of progressive development of national, regional and at the international level. This Chapter has three important segments. The first dealing with earlier efforts towards codification; second, the regional efforts towards codification, especially the European codification that resulted in the adoption of European Convention on Immunity Act, 1972. Thirdly, two major codifications that had taken place in the United States and in the United Kingdom resulting in the adoption of Foreign Sovereign Immunities Act, 1976 of USA and the State Immunity Act, 1972 of UK. The codification in other countries such as in Canada, South Africa, Australia and Pakistan are also dealt with. As the Canadian, South African, Australian and Pakistani legislations on sovereign immunity are by and large similar to the Sovereign Immunities Act of United Kingdom, efforts have been made to explain elaborately the provisions of the Sovereign Immunities Act of UK covering all the important judicial precedents rendered before,

during and after the Act come into force. Similar treatment has been given to the Foreign Sovereign Immunities Act of 1976 of the United States of America. The regional effort towards codification, namely, the European Convention on Sovereign Immunities, which greatly influenced the adoption of the SIA of UK, has also been dealt elaborately.

The fourth segment of this Chapter is devoted to the international codification effort, namely, the Draft Articles on Jurisdictional Immunities of States and their Properties developed by the International Law Commission. Efforts have been made to shed light on the provisions of the draft and to capture the reaction of States to certain key provisions of the draft articles. In short, this chapter is the critical evaluation of the major codification efforts taken on the subject matter nationally, regionally and internationally. The conclusions reached in this part provide a broad picture about the international law of sovereign immunities from the stand point of the conduct of States inferred from their legislative acts and juristic opinions expressed in regard to the codification at the international level.

Part III is an important part, which deals with concept of sovereign immunity in India. The discussions in this part proceeded on the background set in Part I and Part II of this work without which the Indian problem cannot be properly understood. This part contains

chapters, namely, Chapter V, VI and VII dealing respectively with sovereign immunity in India in pre-Constitutional era, statutory provisions relating to sovereign immunity in India and a study of the jurisprudence of courts.

The study of the whole gamut of sovereign immunity in India has necessitated these segments, as the sovereign immunity in India prior to the commencement of the Constitution of India was largely a product of judicial decisions concerning sovereign immunity of the native Rulers rendered by the colonial courts applying the British common law as it then existed.

An interesting finding made here is that the native Rulers under British common law were treated on par with sovereigns. But paradoxically the Princely States were not at all treated as sovereign States. This differential treatment continued to find a place in the early legislations concerning the sovereign immunity in India - a matter which has been discussed in detail in chapter VI of this work.

Chapter VII deals with the jurisprudence of the Indian courts. In this chapter, attempts have been made to analyze the judicial pronouncements of various High Courts and the Supreme Court on this issue. It deals with the interpretation concerning section 86 of the Civil Procedure Code in far greater detail which involves: the meaning of section 86 C.P.C., justiciability of consent; sovereign immunity and commercial activities; and executive decision on sovereign immunity.

At the end of the chapter the waiver of sovereign immunity under Indian law has been dealt with elaborately with the critical analysis of the jurisprudence of the court.

Chapter VIII, which is the last chapter in this Part deals with the conclusions and suggestions of the present study. The suggestions given here are the natural outcome of the findings of the study and it is left to posterity to act upon them.

PART I

DOCTRINE
OF
SOVEREIGN IMMUNITY
IN
INTERNATIONAL LAW

CHAPTER II

SOVEREIGN IMMUNITY: AN INTRODUCTION

The principles of international law regarding jurisdictional immunities of States are largely customary in character. These immunities and restrictions of territorial sovereignty were originally formulated in treaties, charters or as privileges granted unilaterally by Princes to the individuals concerned. The municipal courts, which handled the cases of jurisdictional immunities, on case-to-case basis, later declared these principles as principles of customary international law.[1]

Unfortunately, not many cases were decided on the issue of sovereign immunity prior to nineteenth century. This apparently led to the absence of any reference to this important subject in the classical writings of international law by Gentili[2] Grotius[3], Bynkershoek[4] and

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[1] Bouchez, " The nature and scope of State Immunity from Jurisdiction and Execution," 10 *NYIL* (1979), pp. 3,4.

[2] Alberico Gentili, *De Legatotibus Libri Tres* (1594), Lin II, Chap.XIVI, Concerning the contracts of Ambassadors.

[3] Hugo Grotius, *De Jure Belli Ac Pacis* (1646), Liv. II, Chap. XVIII, S. IV Concerning personal inviolability of Ambassadors.

[4] Cornelius Van Bynkershoek, *De foro Legatorium* (1744), Chaps. XIII,XIV, XV and XVI, Concerning the immunities of Ambassadors from Civil jurisdiction, and Chaps. IV and V regarding the immunities of foreign sovereigns and their property. See Grriir, *Gerichts barkeit iifer frende staaten* (1948), pp. 38-43; and Barbeyracs translation and notes on Bynkershoek's *De foro Legatorium* , pp. 43 and 46.

Vattel[5], although the problem of diplomatic[6] immunity and personal immunities of sovereigns were extensively dealt with by them. During the end of eighteenth and at the beginning of nineteenth century, sovereign immunity had been rather a personalized concept. The political philosophy of that time also talked largely in terms of a sovereign. Similar was the attitude of municipal courts and tribunals which focussed on the immunity of the sovereign as attached to him in the personal capacity.

Traditionally, the concept of sovereign immunity rests on several grounds. One such view is expressed in the maxim '*par in parem non habet jurisdictionem*', which means that the independent sovereigns being equal in legal status cannot have their mutual disputes settled in the courts of one another.[7] In this respect State immunity may appear as a doctrine of *inadmissibility* or *non-justiciability* rather than immunity in the strict sense.[8] The other principle on which immunity is based is that of non-intervention in the

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[5] Emerich de Vattel, *Le Droit des Gens* (1785), Liv. IV, Chap. VII, S. 108 Concerning the immunities of personal sovereigns. Interestingly, Vattel recognised the principles of independence, sovereignty and equality of States in Liv. II, Chap. III, S. 36 and Chap. VII SS. 79 and 81 and the immunity of local State or sovereign from the jurisdiction of its or his own courts in Liv. II, Chap. XIV, S. 214.

[6] See Oppenheim, *International Law, A Treatise* vol.I Edited by H. Lauterpatcht, (ELBS & Longmans) 1966, p.316, 317.

[7] *Ibid* p.264, 265, See also D.W.Greig, *International Law*, (Buttersorths, London, 1976), p.219.

[8] Ian Brownlie, *Principles of Public International Law*, (Clarendon Press. Oxford, 1973), p.315.

internal affairs of other States.[9] The equality of States in international law is yet another reason for according immunity to a foreign sovereign.[10] The maxim *'par in parem non habet imperium'*, which means one cannot exercise authority over an equal, has also been cited as the source of this obligation.[11] This has been gradually interpreted to mean that a State must not exercise jurisdiction through its own courts over another State, unless the other State consents. [12]

BASIS OF SOVEREIGN IMMUNITY

Besides the foregoing, the Anglo-American decisional materials suggest the following theories to explain the functional basis of the rule of sovereign immunity:

(a) Theory of ex-territoriality;
(b) Theory of reciprocity;
(c) Theory of equality and independence;
(d) Theory of comity;
(e) Theory of dignity; and
(f) Theory of diplomatic functions.[13]

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[9] See the reasoning in *Buck.* v. *A.G.* (1965) Ch.745.

[10] Georges Abi-Saab. "The changing world order and the international legal order: The structural evolution of international law beyond the State Centric Model", in Yoshikazu Sakamates (ed) *Global transformation: Challenges to the State System*, (United Nations University Press), p.440.

[11] Rebecca M.M. Wallace, *International Law,* Second edition, (Sweet Maxwell, 1992) p.115.

[12] Hans Kelsen, *Principles of International Law,* (Rinehart & Company Ltd., New York), p.229.

[13] Michael Akehurst, *A Modern Introduction to International Law*, (5th Edn.,George Allen and Unwin, London), p.109. See also D.W. Greig, *supra n.7* at p. 218; Georg Schwarzenberger, *A Manual of International Law,* (Stevens & Sons, London, 1950), p.40.

Of these, the theories of dignity and diplomatic functions are relied upon by very few writers, unlike the theories of independence, comity and ex-territoriality, which almost all writers of international law consider as fundamental to the doctrine of immunity.

Although the substantive foundations of State immunity in international law evidence in the usages and practice of the States in terms of equality, independence and comity of States, their interrelationships are inextricably arranged. It seems, all those notions coalesce to constitute a firm international legal basis for sovereign immunity.[14]

Theory of Ex-territoriality

A State can exercise its coercive powers, in principle, against anybody within its territory. All the individuals staying within the territory of the State are subject to these coercive powers; that means, all the individuals staying within the territorial sphere of validity of a national legal order are subjected to this order with respect to the execution of the coercive acts provided by this order. This rule of general international law is however, subject to exceptions. The international institution of 'ex-territoriality' is one such exception.

According to general international law, certain individuals

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[14] Sompong Sucharitkul, "Immunities of Foreign States before National Authorities" – *Recueil Des Cours* – Collected courses of the Hague Academy of International Law, 1976 p.117.

enjoy the privilege of exception from the coercive power of the criminal, civil and administrative jurisdiction of the State on the territory of which they are staying.

In reality the exemption works through the principle of ex-territoriality where the exempted individuals, through a legal fiction, are treated as if they were not present on the territory of the State in question.[15]

This theory, however is not free from controversy and was clearly rejected by the Privy Council in *Chung Chi Cheung* Case.[16] However, ex-territoriality of the foreign sovereign is still held by some writers as the basis of their immunity from local jurisdiction. The Canadian Government's consent to treat the Queen of Holland as ex-territorial when the Queen, during World War II was hospitalised in Canada for delivery of her child can be cited as a precedent in this regard.

Theory of Reciprocity

The immunities from and limitations of territorial jurisdiction which, today, are considered as rules firmly founded in international customary law, have arisen from a continuous and liberal application of the principles of reciprocity. These immunities and restrictions are

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[15] Hans Kelsen, *op. cit.supra n. 12, p.228-235.*

[16] (1939) A.C. 160; 33 *AJIL* (1939), p.376.

territorial in character, and were originally formulated expressly in treaties or in charters and privileges granted unilaterally by Princes to the individuals concerned. Reciprocity of treatment was one of the basis of sovereign immunity invoked by Marshal C.J. in *Schooner Exchange* v. *McFaddon* when he mentioned "mutual benefit in the promotion of intercourse with each other" which dictates relaxation of absolute and complete jurisdiction within their respective territories which sovereignty confers on States.[17] The rule is simple: do not do to others which you would not like others to do unto you. It is a principle of expendiency, mutual convenience and benefit. It is another name for mutuality of interests.

Theory of Dignity

This theory has been viewed as a derivative of the doctrine of supremacy of the sovereign. According to this theory, it would be undignified if a foreign State has to descend to litigating with private individuals. However, it is pertinent to note that, in the civil law countries, it is not considered beneath the dignity of a sovereign State when it is impleaded. This trend is currently discernible in the Anglo-American system also, as private matters of sovereign are not exempted from jurisdiction under the relevant municipal legislations.

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[17] (1812) 7 *Cranch* 116, at pp. 136-137

Theory of Equality, Independence and Comity

This principle has been applied by courts when they dealt with cases concerning sovereign immunity. The court in *Parliament Belge* referred to state immunity as a "consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State".[18]

The "perfect equality and absolute independence of sovereign", in the classic formulation of the doctrine of immunity by Marshal C.J. in the *Schooner Exchange* v. *McFaddon*[19], gives rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

There are writers who use 'equality' and 'comity' interchangeably. Oppenheim[20] considers that, non-interference of courts of one State over the official acts of another State springs from the principle of independence of States. For him, 'independence of State' implies that the courts of one State do not, as a rule, question the validity or legality of official acts of another State, or the official and officially avowed acts of its agents, at any rate in so far as those acts

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[18] (1880) 5 *P.D.* 197 at pp. 214-215.

[19] *supra n.* 17.

[20] Oppenheim, *op. cit. supra n. 6.*

purport to take effect within the sphere of the latter's own jurisdiction and are not contrary to international law. It, thus, follows that there is no such thing as an absolute immunity. Immunity is transferred to the foreign sovereign as a matter of comity or goodwill, first acknowledging immunity enjoyed by the sovereign in their courts, second to gain similar immunity on the basis of reciprocity.

Lauterpacht[21] is of the opinion that the principle of comity is grounded in the over-riding legal duty to respect the independence and equality status of other States. *Courtoisie international* or international courtesy has also been interchangeably used with comity of nations as an added reason to give more practical weight to the doctrine of sovereign immunity.[22]

There is another ancilliary rule related to the notion of comity, that, in the conduct of international relations, the courts of law should refrain from passing judgment or exercising jurisdiction which would embarrass the political arm of the Government especially in areas which are better reserved for political negotiations. This notion was underlined in the practice of Executive "suggestion" in United States before the enactment of Foreign Sovereign Immunity Act, 1976 and was the basis of Frankfurter and Black JJ observations in *Mexico* v.

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[21] *International Law*, Being the collected papers of Hersch Lauterpacht, Systematically Arranged and Edited by E.Lauterpacht, Q.C., vol. I, (Cambridge, 1970), p.483.

[22] S. Sucharitkul, *op. cit. supra n.*14.

Hoffman that "courts should not disclaim jurisdiction which otherwise belongs to them, except when the department of government charged with the conduct of foreign relations, or Congress, explicity asserts that the proper conduct of these relations calls for judicial abstention."[23]

Theory of Diplomatic Function

This has been propounded by the Court of Appeal in *Rahimtulla* v. *Nizam of Hyderabad.*[24] The formal impleading of the sovereign, according to Lord Denning, "is not a detrimental factor to decide whether the matter deserved immunity or not." The factor to be weighed, according to him, is, "whether the matter under the dispute, in the interest of diplomacy, required to be immunised from the processes of the courts or not."[25]

Besides this, the functional necessities have also provided foundation for the immunities of a sovereign. The concept of functional necessities differentiates areas where immunities are recognised from those where the doctrine of immunity does not apply. In other words, the functional criterion would tend to confine the granting of immunity to cases where the State is acting in its sovereign capacity. In the ultimate analysis, therefore, functional necessities are in turn based on

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[23] 324 *U.S.* 30, at p.42; *A-D.* 1943-45 No. 39, at p. 149.

[24] (1958) *A.C.* 379.

[25] D.P.O'.Connell, *International Law for Students*, (Stevens & Sons, London, 1971), p.342.

the principle of sovereignty or equality of States.

DOCTRINE OF SOVEREIGN IMMUNITY

Although the notion of sovereign immunity is said to be based on the foregoing theories, as a doctrine, sovereign immunity has been viewed by the courts chiefly in two ways:

(i) absolute view ; and

(ii) restricted view.

The Absolute View :

According to this view, a sovereign is at all times entitled to arrest suit or resist execution, irrespective of circumstances or the subject-matter. This doctrine has been relied upon by English and Russian courts till recently.[26]

In *Parliament Belge,* [27] the Court of Appeal relying upon all the relevant earlier cases, stated the essence of the absolute doctrine in the following terms:

> (State) declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use though such sovereign, ambassador or property be within its jurisdiction.[28]

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[26] M.N. Shaw, *International Law*, (3rd edition, Cambridge University Press, 1991) (1994 reprint), p.432.

[27] *supra n.*18.

[28] *ibid.*

The decision in the *Porto Alexandre*[29] contains an extreme expression of this doctrine resulting from the judgments in *Briggs* v *Light Boats*[30], and *Parliament Belge*,[31] stated by Warrinton L. J. thus:

> The ground of that judgement is that the public property of a Government in use for public purposes is beyond the jurisdiction of the courts of either its own or any other State, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a state, which is in its possession for public purposes in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all courts for the same reason – *viz.*, that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State". And then again, when he is summing up the principle which he thinks is to be deduced from all the cases he says : "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or" – and these are the material words-" over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

The argument which has been presented in favour of "absolute immunity" is that its alternative is "no immunity" and that there is so far no workable criterion by which to limit immunity. As Sir

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[29] 14 *AJIL* (1920), p.273.

[30] (1865) 93 *Mass.* 157.

[31] *supra n.*18 at p.213, 217.

Gerald Fitzmaurice puts it:

> The distinction between the sovereign and non-sovereign acts of a State is arbitrary and unreal, and one which is not easy to apply in practice and which might become much more difficult to apply if States cared to take the appropriate measures; one which, moreover, must always leave a sort of no-man's land of actions capable of being regarded as coming within either category. The conclusion seems to be that the only sound course is to adhere to the strict doctrine of complete immunity, any departures from it in specific cases being regulated by international convention.[32]

The acceptance of the principle of absolute immunity is therefore based to some extent, on the view shared by writers that a State always acts as a public person. It cannot act otherwise. "A state", says Hyde, who otherwise holds a restrictive view of immunity, "never acts in a private capacity, even when the activity in which it participates is one commonly confined to and carried on by the private individual".[33]

The Restrictive View:

According to this view, the foreign sovereign may arrest suit or resist execution only in respect of Government activity or property. It is usually expressed in the form that immunity covers acts *jure imperii* (i.e. acts essentially governmental) and not acts *jure gestionis* (i.e. acts essentially commercial).

Besides these two views, certain radical proposal advanced

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[32] Fitzmaurice, "State Immunity from Proceedings in Foreign Courts", 14 *BYIL* (1933), pp. 101-124.

[33] Hyde, *International Law* –Chiefly as Interpreted and Applied by the United States, 2nd revised edition (Little, Brown & Comp.,1951) at p.844.

by Prof. Hersch Lauterpacht[34] deserves a mention as some of his proposals in course of time became positive law of England[35]. In his view, the position of foreign States should be assimilated to that of the domestic State on the question of jurisdictional immunities, subject to four important exceptions.[36] He favoured a general rule of non-immunity subject only to very specific safeguards for public property. He concluded by emphasizing the "essential insignificance" of a problem which had "tended to infuse an element of artificiality into international law. He, therefore, suggested "freeing international law of the shackles of an archaic and cumbersome doctrine of controversial validity and usefulness".[37] Sucharitkul suggested the assimilation of State traders to private persons so as to provide a minimum criterion to limit the operation of the doctrine of sovereign immunity.[38]

Since the First World War, there has been a strong tendency in favour of restrictive immunity in the judicial and governmental

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[34] H. Lauterpacht. "The Problem of Jurisdictional Immunities of Foreign States," 28 *BYIL* (1951), p.220.

[35] C.H.Schreuer, *State Immunity: Some Recent Developments.* (Cambridge, Grotius Publication Ltd., 1988), p.2.

[36] Lauterpacht, *op. cit. supra n.*34, pp.236-239. The following are the four exceptions:

(a) Legislative acts of a foreign State within its territory,
(b) Executive acts of a foreign State within its territory,
(c) Transactions over which, according to the rules of private international law of the *lex fori*, the courts have no jurisdiction.
(d) Acts contrary to the accepted principles of international law in the matter of diplomatic immunities (e.g. diplomatic property and war ships).

[37] *ibid*, p.247.

[38] Sucharitkul, *op. cit. supra n.*14.

practice of States. This development was in consonance with the corresponding shift in the attitude of writers. By the end of the Second World War, it was no longer true that the opinions of writers on the subject under discussion were evenly divided. Now an ever-growing majority of recent and contemporary writers – assuming the complexion of the general consensus of opinion – have subscribed to a restrictive doctrine of immunity.[39]

As has been stated elsewhere, the English courts which followed the absolute immunity approach till 1975, began to change its attitude when two of the Lords in *Cristina*[40] criticised *Porto Alexandre* decision and doubted whether immunity covered State trading vessels[41] also. The restrictive immunity rule, however became part of common law by the decision in *Philipine Admiral Case*.[42]

The courts in the United States also largely followed the absolute theory of immunity till the so-called "Tate letter" issued by the Department of State in 1952 declaring a change in American policy thus:

The immunity of the sovereign is recognised with regard

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[39] Prominent among modern subscribers to a restrictive doctrine are: E. W. Allen, R. D. Watkin, P. Shepherd, J. Y. Brinton, J.W.Garner, J.G. Hervey, G.G.Phillimore, B. Fensterwald, C. Fairman, W.T.R. Fax, N. Wolfman, C. Carabier, M.R. Hennebicq, B. Trachtenberg, Charles De Visscher, W.W. Bishop, J.P. Niboyet, C.C. Hyde, W.Friedman, J.E.S. Fawcett, F. Loewenfeld, E. Lemonon, J.F.Lalive, P.B. Carter, Judge Lauterpacht, Lord Denning and Eric Suy.

[40] (1938) AC 485.

[41] Lord Macmillan, *ibid* p.498.

[42] (1977) AC 373 (J.C.).

to sovereign or public acts (*jure imperii*) of a State, but not with respect to private acts (*jure gestionis*).[43]

A shift towards restrictive immunity became a common practice in other parts of Europe also. The decision in *Dralle* v. *Republic of Czechoslovakia*[44] and *Empire of Iran Case*[45] are reflective of this trend. Various national codifications such as Foreign Sovereign Immunities Act (FSIA), in United States[46] the State Immunity Act (SIA) in Britain[47] and similar enactments in Canada[48], South Africa[49], Pakistan[50], Singapore[51] and Australia[52] also maintain the dichotomy of sovereign acts and commercial acts. However, there have been considerable variations as regards the criteria for distinguishing sovereign acts from commercial acts.

The regional and global efforts to codify law on this point, aimed at the removal of ambiguity created by case laws continued during the last three decades. The European Convention on Foreign Sovereign

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[43] 6 *Whiteman's Digest of International Law*, (Washington, 1968), pp. 569-71.

[44] 17 ILR (1950),at p.155, a decision by Supreme Court of Australia.

[45] 45 ILR(1963),at p.57, a decision by Federal Constitutional Court, German Federal Republic.

[46] Public Law, 94-583, 28 V.S.C. 1330, reproduced in (1982) 63 ILR 655.

[47] 64 ILR (1983) p.718, 17 ILM (1978) p.1123.

[48] 21 ILM (1982) p.798.

[49] Reproduced in Material on Jurisdiction Immunities of States and their property, United Nations Nations Legislative Series, ST/LEG/SER-B/20. p.32.

[50] ibid p.20.

[51] ibid p.28.

[52] 25 *ILM* (1986) p. 715.

Immunity of 1972;[53] Draft Articles for a Convention on Foreign Sovereign Immunity prepared by the International Law Association in 1982;[54] and the Draft Articles on Jurisdictional Immunities of States and their property prepared by the International Law Commission, 1991[55] are certain important instances in this direction.

Despite these developments and the availability of voluminous amount of decisional, statutory and the international legal material, uncertainty about the extent of sovereign immunity continues. The new codifications are unable to show the direction of law of sovereign immunity. The confusion created by them has succinctly been stated thus:

> Today it has become difficult to say whether State Immunity is a question of customary international law, of treaty law or of domestic law, but perhaps this is just as well, in order to remind us that we cannot compartmentalize international legal problems neatly by sources but have to take a more synoptic view which takes account of variety of types of legal authority.[56]

This led some writers to claim that the wider principle of immunity (absolute immunity) represents the law.[57] At the same time a considerable number of writers maintain that the preponderant practice

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[53] 11 *ILM* (1972) p.470.

[54] International Law Association, Montreal Conference (1982), reprinted in 22 *I.L.M.* 287 (1983).

[55] *YBILC*, Vol.II, Part Two, (1991) – Doc. No. A/CN 4/SER.A/1991/Add.1 (Part 2).

[56] C.H. Schreuer, *op. cit. supra n* 35, at p.4.

[57] Fitzmaurice, *op. cit supra n.*32, at p.117; Brierly, *Law of Nations* (16th Edn., Oxford Clarendon Press) p.250.

supports a principle of restrictive[58] immunity on the basis of the distinction between acts *jure imperii* and acts *jure gestionis.* However, there is "no uniform practice ... there is no common ground ... there is no uniform rule as to the determination of acts *jure gestionis*", in the words of Lord Denning.[59] An act which is considered as *jure imperii* by one court may be regarded *jure gestionis* by another court. This logical contradiction springs from the value judgement which rests on political assumptions regarding the proper sphere of State authority and priorities in State politics.[60]

Jurists have offered various criteria for distinguishing between acts *jure imperii* and acts *jure gestionis.* Weiss suggested that the "nature" of the act was the determinant. Another approach suggested that the "purpose" of the act would be more appropriate to determine acts *jure gestionis.* Nonetheless, in practice, in either case, reference to social and economic policy becomes inevitable.[61] The more recent attempts at codification, therefore, have adopted an opposite method. They start from a general rule of immunity, which is subsequently modified by a list of non-immune activities.[62]

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[58] Lauterpacht, *op cit. supra n.*34.

[59] *Rahimtoola* v. *Nizam of Hyderabad* (1957) 3 *W.L.R.* 884, 903-914, at p.909.

[60] Sucharitkul, *State Immunity and Trading Activities in International Law* (London, Stevens & Sons Ltd., 1959), pp. 335-59.

[61] I. Brownlie, *op. cit. supra n.* 8, at pp. 324-25.

[62] *ibid.*

The foregoing discussion shows that the general principle of sovereign / state immunity has largely been moulded by the national legal systems through the statutes and judicial decisions. The socio-economic and political factors have played a vital role in determining its nature, extent and the objects which fall under it.

Since the present study primarily deals with the law of sovereign immunity in India, which is only an extension of British Law and practice on the subject, it is pertinent to deal with the common law principles of sovereign immunity emerging out of the Anglo-American practice before embarking upon the study of sovereign immunity in India.

CHAPTER III

THE COMMON LAW CONCEPT OF SOVEREIGN IMMUNITY: A STUDY OF ANGLO-AMERICAN PRACTICE

The basic principle of sovereign immunity is that a State cannot be sued in the courts of a foreign State. It has been followed as a customary rule of international law in all legal systems. In the common law countries such as England and the United States of America, the courts spelt out the content of this principle on case to case basis. Originally, this principle regarded the sovereign immunity as a personalised concept but later it expanded to include the State and its instrumentalities such as its armed forced, its public vessels and its economic or trading entities.

The evolutionary process of the principle of sovereign immunity as a common law doctrine involves two phases. The first phase, wherein case laws dealing with this subject matter enormously placed emphasis on unrestricted immunity to the sovereign. The second phase involved case laws in the United Kingdom and in the United States of America which restricted the scope and application of the sovereign immunity rule. Nevertheless, an enquiry into the law and practice on sovereign immunity in India warrants the study of Anglo-American cases which are highly relevant for countries which do not have a statute on sovereign immunity, and their courts till today follow

only common law principles of sovereign immunity. In this context the common law as it prevailed prior to its substitution by formal codification in the form of Foreign Sovereign Immunities Act (FSIA), 1976 and State Immunity Act (SIA), 1978, is more appropriate and relevant for this study.[1]

It is, therefore, important to take stock of all the vicissitudes of pre-statute common law such as extension of immunity to the property of sovereign on the basis of possession or control, public vessels and State instrumentalities. Another equally important area is immunity from execution of judgements against foreign states and doctrine of Waiver and the reception of this doctrine in common law courts.

ANGLO-AMERICAN PRACTICE

English and American decisional materials indicate that Anglo-American practice favoured the absolute doctrine[2] of sovereign immunity till recently. Although departure from this practice was made by American courts much earlier, than the English courts which began to drift towards a modified state immunity

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[1] It may be relevant to state that, the post-statute decisions in UK and the USA being only the interpretations of statute and not of common law, play a very limited role useful only to assess the efficiency of the statute based system in dealing with sovereign immunity rather than development of law by courts.

[2] According to absolute or classical doctrine of sovereign immunity, a sovereign is at all times entitled to arrest suit or arrest execution irrespective of circumstance or the subject matter. See D.P.O'.Connell. *International Law for Students*, (Stevens & sons, London, 1971), p.343.

approach[3] only during seventies. The meaning and scope of sovereign immunity and its relationship with international law has been the subject-matter of dispute in innumerable cases. But the basic position on this customary principle has been succinctly stated by Lord Atkin in The *Cristina*[4] in the following words:

> Two propositions of international law engrafted into our domestic law...seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him, against his will a party to legal proceedings whether the proceedings involved process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is party to the proceedings or not, seize or detain property which is or of which he is in a possession or control.[5]

This means, whether the litigation concerned the public or private affairs of a foreign sovereign or concerned public ships employed for public or purely commercial purposes, it was still the foreign sovereign who was being made a defendant in the action, and that is something which English law would now allow.[6]

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[3] "Modified state immunity" is the other name given by Rebecca M.M. Wallace to varieties of restricted views followed by States. See Rebecca M.M. Wallace, *International law*, 2nd edition, (Sweet & Maxwell Ltd., London, 1992), p.116.

[4] (1938) *A.C.* 485.

[5] *ibid* p. 490.

[6] D.W. Greig, *International Law*, 2nd edn. (Butterworths, London., 1976)

PRACTICE OF U.K.

The decisions of English courts in *Mighell* v. *Sultan of Johore*,[7] *Statham* v. *Statham and the Gaekwar of Baroda*[8], and in *De Haber* v. *Queen of Portugal* [9] reveal to us how the English courts behave in dealing with the litigation involving private affairs of foreign sovereign.

In *Mighell* v. *Sultan of Johore*, the plaintiff brought a suit against the Sultan of the independent State of Johore in Malay peninsula for a breach of promise of marriage given to the plaintiff under an assumed name Albert Baker. When the plaintiff brought a suit, the defendant Sultan disclosed his real character. It was sufficient, then, for the court to dismiss the proceedings for want of jurisdiction. In *Statham* v. *Statham*, the co-respondent Gaekwar was exempted from jurisdiction as a sovereign, from proceedings for divorce. In *De Haber* v. *Queen of Portugal*, the queen even in public capacity was held to be immune from jurisdiction regarding debt proceedings. It is interesting to note that, in the first two cases, neither Johore nor Baroda were sovereign independent States. The former being a British protectorate and the latter under British suzerainty, were conceded the status of sovereign states under notes to the effect from the British Foreign Office, which

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[7] (1894) 1.*Q.B.* 149 (C.A.).

[8] (1912) *P.*92.

[9] (1851) 17 *Q.B.* 171.

acted upon political consideration rather than in a strictly legal manner.

English courts, although always distinguished between action against the sovereign in his private capacity and in his public capacity, yet generally applied the rule of immunity for both.[10] When a sovereign is actually named as a defendant the proceedings identify themselves and the suit must be arrested. This general rule of immunity had been extended to even an order for service of documents.

However, in majority of cases the sovereign is indirectly impleaded. In such cases plea of sovereign immunity may be raised by the party through whom the sovereign interests are engaged or by the sovereign himself in an interpleader action. Problems have arisen in deciding when the sovereign is actually impleaded indirectly as it is insufficient to propose that he is impleaded indirectly, more so, when his property or interests are put in issue.[11] As the interests in property are in a varieties of forms and each one of them is amenable to litigation, law of immunity dealing with these problems has been said to be in danger of being "enmeshed in its own net".[12] Courts tend to look which way a sovereign is impleaded : directly or indirectly, than the legal issues involved in the matter.

Decisional materials from United Kingdom indicate that foreign

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[10] D.P.O. 'Connell, *op. cit. supra n.*2, p. 344.

[11] *ibid.*

[12] *Rahimtoola* v. *Nizam of Hyderabad*, (1958) A.C. 379, per Lord Denning, at p.424.

sovereign is very often impleaded in action involving his title to property or his possession of property or control of it.

(i) Actions of Title

Where the actions put in issue the title of the foreign sovereign, the latter is impleaded. However, it is not correct to say that, a mere assertion of his right to the property makes the case entitled to immunity. The court still has to adjudge that the claim is responsible. The proceedings are stayed once the court determines that the sovereign interests are involved in the particular case. The court's test as to whether the claim of sovereignty is acceptable or not has been dealt in *Juan Ysmael & Co.* v. *Indonesian Government,*[13] where the Privy Council observed thus:

> A foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party...is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relations to the foreign Government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.[14]

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[13] (1955) *A.C.* 72. The court in the instant case found that the Government of Indonesia's title over a ship, which was the subject mater of action, was defective. So, it held that the appellant's agent had no authority to sell the ship. By the same token, it was held further that the Indonesian government's plea of sovereign immunity could be sustained.

[14] *ibid*, p.89.

Similar line of reasoning was also adopted while deciding *Rahimtoola* v. *Nizam of Hyderabad.*[15]

(ii) Actions relating to subject matter in the "possession" of a foreign sovereign

Where a foreign sovereign is in possession of the subject matter of action, he is said to be impleaded. However, "possession" referred to in this context does not have any technical connotation. The "possession" here means even a right to possess. The sovereign is, therefore, said to be in possession when he has a right to possess. His right to possess will depend upon the contract which he may have made with the actual "possessor". Hence, a sovereign is the "possessor" for the purpose of immunity if he is the bailor of the subject matter and no suit may be maintained against the bailee.[16] In early English cases, on possession too, the foreign sovereign did claim rights. Problems arose when sovereign who asserted a possessory title to the bailed subject matter made no claims to property in it.

The question as to whether a "beneficial owner" will be allowed to pursue an action on the theory that he had the superior right to possession from the bailee was answered negatively by the House of Lords in *United States of America & Republic of France* v. *Dollfus Mieg*

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[15] See Lord Denning in *Rahimtoola, op. cit. supra n.*12, at p.416.

[16] *United States and Republic of France* v. *Dollfus Mieg et Cie S. A. and Bank of England,* (1952) *A.C.* 582, per Lord Radcliffe, at p.614.

et Cie. S.A. and Bank of England.[17] The facts of the case were that sixty four numbered gold bars had in 1944 been wrongfully removed by German troops from a French bank, then holding them on behalf of Dollfus Mieg et Cie. S.A., a French company. The bars were eventually recovered in Germany and lodged with the Bank of England by the Governments of the United Kingdom, France and the United States for safe custody pending their ultimate disposal. The company brought an action against the Bank of England claiming delivery of the bars, an injunction restraining the Bank from putting with the possession of them otherwise than as directed by the company and, alternatively, damages. The Bank applied the motion to have the writ set aside and all subsequent proceedings in the action stayed on the grounds that the bars were in the possession or control of the three governments, and that the action impleaded two foreign States which were added as defendants and declined to submit to the jurisdiction of the court. During the argument before the Court of Appeal it was established that thirteen of the bars had been sold by mistake, leaving fifty-one in the Bank's vaults. The House of Lords held that the action must be allowed to continue as against the fifty-one bars because these were specific chattels, "and if the plaintiffs obtained damages for conversion of them, the bank would be able to set up the plaintiffs' title against the

[17] *ibid.*

sovereign governments and that would materially affect the existing right of the sovereign Governments to possession of them".[18] The peculiar result of the case was to expose the Bank to the risk of double recovery in respect of the thirteen bars, because the sovereigns could also recover a bailment unless the umbrella of immunity was lifted to allow the Bank to set up paramount title of the plaintiffs, a course which would affect the dignity no less than if the disputed title to the fifty-one bars had been litigated.

The joint reading of decisions in *Cristina*[19], which was followed in *Arantzazu Mendi*[20] with *Juan Ysmael & Co. Inc.* v. *Indonesian Government*[21] led to a conclusion that a basic assertion of a possessory right is not sufficient to claim sovereign immunity, but the claim to possession has to have at least some substance. This principle is equally applicable for the assertion of title also.

(iii) Actions relating to the subject-matter in the "control" of a foreign sovereign

Lord Atkin's observation in *Cristina*[22] created certain problems with regards to drawing a line between "possession" and "control". In

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[18] See Lord Denning in *Rahimtoola, op. cit. supra n.* 12, at p. 419.

[19] *supra n.* 4, pp. 506, 516.

[20] (1939) *A.C.* 256.

[21] *supra n.*13.

[22] *supra n.* 4.

the *Dollfus Mieg* case,[23] Earl Jowett thought that the word "control" as "the second limb of Lord Atkin's proposition", was one of vague import.[24] So far as gold was concerned he thought that "control" was a less apt criterion than "possession" for the simple reason that all the depositors required was that the bars should be left in the vault. The difficulty in distinguishing between "possession" and "control" however, continued in *Rahimtoola* v. *Nizam of Hyderabad.*[25] This case concerned a large sum of money which stood to credit to the Nizam of Hyderabad in the West Minster Bank in 1948. A meeting was held between the Finance Minister and the Agent-General for Hyderabad, and the Prime Minister of Pakistan and the High Commissioner of Pakistan, Mr.Rahimtoola, whereby it was orally agreed to transfer the money in an account in Rahimtoola's name. The transfer was duly effected but was invalid because the Nizam had not authorised it. In 1953, the Nizam issued a writ against the Bank and Rahimtoola to recover the money, and Rahimtoola moved for an order to set aside the writ. The unusual circumstance of the case was that the depositor was not by name Pakistan, a country which claimed no beneficial interest in the deposit.

The majority of the House of Lords pursued the formal approach

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[23] *supra n.* 16.

[24] *ibid*, p.604.

[25] *supra n.* 12.

of Lord Atkin, holding that Rahimtoola was the agent of Pakistan which thus had control of the deposit. Lord Denning held that the legal title to deposit was in Rahimtoola, but he concurred for the reason that this was a sort of case which was best reserved for diplomatic negotiation.

The instant decision makes it clear that the concept of control casts the net of immunity more widely than possession. It also makes it clear that the immunity is not to be confined to cases in which the foreign sovereign is himself technically possessed of the subject matter either directly or through his servant.

(iv) Immunity of public ships

The Anglo-American cases on sovereign immunity involve accordance of immunity to public ships also. The term 'public ships' had been interpreted to mean ships publicly owned, including war ships, unarmed ships reserved for governmental functions and State trading vessels.[26] In the Anglo-American jurisprudence, a public armed ship "constituted the part of military force of the nation"[27] and, therefore, it is accepted that warships are immune from the jurisdiction of any foreign sovereign. Nevertheless, a visiting warship should not flout port regulations. If it does flout, it may be required to leave. The jurisdictional immunity is limited to the fact that the ships be arrested or

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[26] D.P.O'.Connell, *op. cit. supra. n.*2,at p. 353.

[27] *The Schooner Exchange* v. *McFaddon*, 7 *Cranch* (1812) 116.

taxed and that the local authorities have no competence with respect to crimes committed on board unless the Captain surrenders the offender to them. The officers and crew of the ship when they go ashore are subjected to local jurisdiction in the same way as any other visiting armed forces. In any of these respects, however, the immunity may be waived.

It may be mentioned here that a warship although considered a part of the military force of the nation has not been regarded as a "territorial enclave". A leading decision[28] on this point clearly explains this position.

In this case the appellant, who was a British subject, was a member of the crew of a Chinese warship, killed the Captain of the ship who was also a British subject but in the service of the Chinese Government, while the vessel was in the territorial waters of Hong Kong. After the homicide, the first officer ordered the appellant to be taken ashore to a hospital. The Chinese Government sought his extradition but their application failed because he was a British subject. The colonial authorities then indicted the appellant for murder, "in waters of this colony". He contended the jurisdiction of the court to try him on the ground that the homicide having occurred on a foreign warship was extraterritorial, and the court accordingly lacked

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[28] *Chung Chi Cheung* v. *The King*, (1939) *A.C.* 160.

jurisdiction. The Privy Council rejected the view that a public ship is part of the territory of the nation to which she belongs, holding that the homicide had in fact occurred within the territory of the Hong Kong.

The unarmed ships reserved for governmental functions also avail the same immunity as warships. The obvious illustration is the treatment accorded to a presidential yacht. However, the extent to which the publicly owned merchant vessels avail sovereign immunity is not clear from the decisions by English courts as they represent a co-existence of restrictive view of sovereign immunity with absolute view.

For example, it was decided in *Charkieh*[29] that a vessel owned by Khedive but devoted to commercial functions was not immune in an English port. However, this reasoning of Sir Robert Phillimore was overruled by the Court of Appeal in *Parliament Belge*.[30] In this case, a proceeding in Rome on behalf of owners of a British ship were instituted against a Belgian Ship. The Attorney General filed their protest to the jurisdiction on the ground that the ship was owned by the Belgian Crown. It was stated that she was a mail packet running from Ostend and Dover, and was the subject of an Anglo-Belgian convention of 1876, wore the Belgian Royal flag and was officered by officers commissioned in Royal Belgian Navy. Whereas the other party

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[29] (1873) *L.R.* 8 Q.B. 197.

[30] 1880 5 *P.D.* 197; See also J.W. Garner, "Immunities of State-owned Ships Employed in Commerce," 6 *BYIL* (1926).

argued that the immunity of the ship, as an unarmed ship reserved for governmental functions, was lost because she carried passengers and freight for profit. However, the Court of Appeal upheld the immunity of the vessel by disregarding the purpose for which the ship was used and the decision was taken mainly on the basis of the fact that the ship was the property of the Government. However, what was exactly the *ratio decidendi* of the decision remains still a controversy. Nevertheless, one thing seems clear that the English courts tend to treat differently the vessels which have been devoted for public purposes from the vessels not so devoted. In fact, the Court of Appeal relied upon this decision in the *Porto Alexandre*[31], holding that any ship owned by or in the possession of a foreign sovereign enjoys immunity in an English court irrespective of the use to which it is put, although indication was given that had there been no binding authority the identical decision might not have been given[32]. However, in *Cristina*[33], Lord Atkin and Wright appeared to have accepted that the *Parliament Belge* was correctly interpreted in the *Porto Alexandre*, whereas Lords Thankerton and Maugham disagreed and held a view that the *Parliament Belge*, had been misinterpreted. Considering the controversy surrounding the soundness of the decision in the

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[31] 1920 *P.* (C.A.) 30.

[32] *ibid*, Per Scrutton L.J. at p. 38.

[33] *supra n.*4.

Parliament Belge, Professor D.P.O'.Connell is of the view that English law has not yet committed itself to granting immunity to State-owned trading vessels. The present tendency is in favour of the application of restrictive immunity to the State-owned trading vessels. Courts in Ireland and Canada, which also belong to Anglo-American system of law, are not inclined to follow the absolutist doctrine represented in *Cristina* and the *Parliament Belge*.

(v) Application of Restrictive Immunity in English Cases

The principle of unqualified immunity has suffered a serious set back through certain dicta expressed by the House of Lords in a number of cases. This trend began with the *Cristina* (1938) wherein, as has been explained above, considerable doubts had been raised about the soundness of doctrine of absolute immunity. The observations of Lord Thankerton and Lord Maugham declaring themselves free to reconsider the decision in *Porto Alexandre* had been quoted widely and followed in common law countries outside the United Kingdom.[34] Evershed M.R. in *Dollfus Mieg et Cie* v. *Bank of England*[35] agreed with Lord Maugham that "the extent of the rule of immunity should be jealously watched".[36] On further appeal to the House of Lords, three

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[34] See Sompong Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Ltd., London, 1959) pp. 162,163.

[35] (1952) 1 *All E.R.* 572.

[36] (1950) 1 Ch. at p.356, in the Court of Appeal.

out of four Law Lords concurred with the observation of Lord Maugham that the doctrine of immunity should not be extended.[37]

The observation of Viscount Simon in *Sultan of Johore* v. *Aris Bendahara Abubakar*[38] and the observation of Singleton L.J. in *Baccus case*[39] and in *Krajina* v. *Tass Agency*[40] are supportive of restrictive theory of immunity.

Another proponent of restrictive immunity was Lord Denning, who contended that there was no uniform rule emerging even after a search among the accepted sources of international law. In *Rahimtoola* v. *Nizam of Hyderabad*[41] he observed thus:

> If the dispute brings into question, for instance, the legality of international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have such dispute canvassed in the domestic court of another country, but if the dispute concerns, for instance, the commercial transactions of the foreign Government (whether carried on by its own departments or agencies by setting up seperate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.[42]

In *Thai Europe Tapioca Service Ltd.* v. *Govt. of Pakistan,*

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[37] *supra n.*35.

[38] (1952) 1 *All E.R.* 1261; See also a note in *L.Q.R.* 68 (1952), p. 293.

[39] (1957) 1 Q.B. 438 at p. 459.

[40] (1949) 2 *All E.R.* 274, 285.

[41] *supra n.*12.

[42] *ibid.*

Ministry of Food and Agriculture, Directorate of Agricultural Supplies,[43] the court reiterated the restrictive view proposed in the *Rahimtoola* case.

The *Tapioca* case[44] is important for another reason also. In this case Lord Denning attempted at enumerating some exceptional circumstances in which sovereign immunity would not apply. He observed:

> where the action concerned land situated in U.K. or debts incurred for services rendered to property in the U.K.; and when a commercial transaction was entered into with a trader in the U.K. and a dispute arises which is properly within the territorial jurisdiction of our courts.[45]

Despite the observations against the decision in *Porto Alexandre*, it continued to have influence on all the subsequent decisions on this issue. Finally, it was in *Owners of the ship "Philippine Admiral"* v. *Wallen Shipping, Hong Kong Ltd.*[46] the Judicial Committee

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[43] (1975) *All E.R.* 961.

[44] (1975) 1 *WLR* 1485, 64 *ILR.* 81. The fact of the case was that a German owned ship on charter to carry goods from Poland to Pakistan had been bombed in Karachi by Indian planes during the 1971 war. Since the agreement provided for disputes to be settled by arbitration in England, the matter came eventually before the English Courts. The cargo had previously been consigned to a Pakistani corporation, and that corporation had been taken over by the Pakistani Government. The ship owners sued the Government for the 67 day delay in unloading that had resulted from the bombing. The government pleaded sovereign immunity and sought to have the action dismissed.

The Court of Appeal decided that since all the relevant events had taken place outside the jurisdiction and in view of the action being *in personam* against the foreign government rather than against the ship itself, the general principle of sovereign immunity would have to stand.

[45] *ibid.*, p.84.

[46] (1976) 2 *WLR* 214, 64 *ILR*, p.90. Sinclair describes this as a "historic landmark" See Sinclair, "The Law of Sovereign Immunity: Recent Developments" 167 *Hague Recueil*, at p.113.

of the Privy Council refused to follow the *Porto Alexandre* and also pronounced in favour of doctrine of restrictive immunity. However, the traditional approach of according absolute immunity for actions *in personam* and restrictive immunity for actions *in rem* continued till the decision of *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria*.[47] In this case all the judges of the Court of Appeal accepted the validity of the restrictive approach as being consonant with justice, comity and international practice.[48] This was affirmed in a later case,[49] more particularly by House of Lords,[50] in the *Congreso del partido* case[51] and in *Alcom Ltd.* v. *Republic of Colombia*.[52]

(vi) Immunities of Governmental Instrumentalities

The emergence of public corporations as an instrumentality of government is the phenomenon of 20th century. The determination as to whether a public corporation is a sovereign organ or not is largely decided by the national authorities of a State which accord or intend to accord sovereign immunity to the particular corporation. The national practices are not uniform. There have been cases where, dictated by experiences or otherwise, the courts have accorded immunity to such

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[47] (1977) *WLR* 356.

[48] *ibid*, pp. 356-60, (Denning M.R.); 380 (Stephenson L.J.); and 385-386 (Shaw L.J.).

[49] See *Hispano Americana Mercantile S.A.* v. *Central Bank of Nigeria*, (1979) 2 *LL.R.* 277.

[50] (1981) 2 *All ER* 1064; See also *Planmount Ltd.* v. *Republic of Zaire*, (1981)1 *All ER* 1110.

[51] (1981) 2 *All ER* 6.

[52] (1984) *A.C.* 580.

autonomous entities holding them to be an integral part of the foreign government.[53] As a matter of fact, the consideration of corporation as an entity distinct from the sovereign is not a universal conception. For example, English courts have pointed out that since separate incorporation does not, in English law, withdraw a governmental instrumentality from the shield of Crown, no prosecution, one way or other, is to be drawn from the fact of incorporation of a foreign instrumentality. This view has become inevitable for the reason that in England many Ministries or departments of Government are incorporated. The Secretary of State in Council for India, the Postmaster General, and the Commissioners of Public Works are institutions incorporated under law. The Crown itself is a corporation sole. Thus, in *Meckenzie-Kennedy* v. *Air Council* [54] it was held that public corporations enjoy State immunities.

In *Krajina* v. *Tass Agency*[55] the certificate from the Soviet Ambassador to the effect that Tass Agency constituted a Department of the Soviet State was accepted, as the plaintiff failed to prove otherwise. The fact of the case was that the plaintiff claimed damages for an alleged libel contained in an article which appeared in a free news sheet published by the defendants, who after entering a

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[53] D.P.O'.Connell, *op. cit. supra n.*2, at p.356.

[54] (1972) 2 *K.B.* 515 at p. 34.

[55] (1949) 2 *All E.R.* 274.

conditional appearance, took out a summons asking that the writ be set aside because they were a department of a foreign State, the Soviet, and so entitled to immunity from the jurisdiction. The Master ordered that the writ be set aside and the plaintiff appealed.

An affidavit was filed exhibiting a certificate from the Soviet Ambassador, to the effect that: "the telegraph agency of the Union of Soviet Socialist Republics, commonly known as Tass, or the Tass Agency, constitutes a department of the Soviet State, i.e. the Union of Soviet Socialist Republics, exercising the rights of a legal entity". Before the Court of Appeal, the defendant was given leave to put in further evidence the full text and translation of the statute establishing Tass.

The plaintiff argued that the effect of the statute as a whole was that Tass not only had the rights of a legal entity, but was a legal entity. But if Tass had a juridical existence separate from the sovereign, the sovereign immunity could not attach to it.

The appeal was dismissed, the court holding that after a certificate of the Soviet Ambassador had been put in, the burden of disproving that the Tass Agency was a department of the State, was on the plaintiff. That burden the plaintiff had failed to discharge.

But in the very next case, *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[56] the court applied a different test. The test was whether the incorporated body was a governmental department or not. The facts of the case were as follows:

The plaintiff, a limited company formed under the law of Italy, sued the defendants, carrying on business in Spain, for damages in respect of breach of contract. On 20 October 1954, an appearance was entered for the defendants by their solicitors in London. On 19th November 1955, the statement of claim was delivered. On 30th January 1956, an order was made by consent for security for the defendants' costs. On 18th April 1956, a summons was issued on behalf of the defendants praying that all proceedings be stayed and that the writ, etc. be set aside on the ground that the defendants were a department of the State of Spain and the State through its ambassador claimed sovereign immunity. It was admitted by the defendants that they possessed a legal personality, had power to make contracts on their own behalf for the buying and selling of wheat and could sue and be sued in their own name. It was not, however, disputed that, apart from the effect of their incorporation, the defendants would be a department of the State of Spain. Further, the head of the department had given instructions to the defendants'

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[56] *supra n.39.*

solicitors to enter appearance and ask for security for costs without the knowledge or authority of the Spanish minister of agriculture to whom the head of the department was directly subordinate and who, apart from the Cabinet or Head of the State of Spain, was the only person with authority to decide whether the defendants should admit to the jurisdiction of a foreign court. The Court of Appeal, with Singleton L.J. dissenting, held that the defendants were department of the State of Spain, notwithstanding that they were a corporate body and a separate legal entity. They were, therefore, entitled to claim sovereign immunity.

However, the dissenting Judge, Singleton L.J. was of the opinion that the defendants were not a department of the State in the ordinary sense. They were a separate legal entity, a judicial personality, and the head of the department must be regarded as a person to whom the ordinary business of the entity was entrusted, "one might well think that it would be his duty to do what was necessary to protect the interests of the body over which he presided."

In a recent case of *Mellenger* v. *New Brunswick Development Corporation*[57] a corporation was held entitled to immunity on the

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[57] (1971) 1 *W.L.R.* 604, it was a case concerning a claim for 250,000 pounds as commission, brought by two industrial consultants against the defendant Corporation, alleged to be payable in respect of a business introduction leading to the establishment of a chipboard plant in New Brunswick. On appeal by the corporation leave was granted to add a new ground of defence, namely, that the corporation was in law and in fact a Crown Corporation and entitled to immunity from suit. It was held by the Court of Appeal that the corporation was an arm or alter ego of the Government of a sovereign State and therefore entitled to immunity.

reasoning that the corporation was an arm or alter ego of a sovereign State.

PRACTICE OF U.S.A.

Contrary to the practice of the English courts, the courts in the United States of America saw this problem in a different way. There has been an increasing tendency to distinguish between the public and commercial activities of foreign States.[58] They have consistently refused to allow claims of immunity based on the title of their foreign sovereign to the subject-matter of the contention when their sovereign was not in possession.

The courts in the United States were not troubled by the personal immunities of foreign sovereigns as they had no opportunity to deal with monarchies of Europe and were unaffected by the repercussions of maintaining a colonial empire containing Sultans and Nawabs. They were increasingly called upon to deal with a number of clients to immunity on behalf of State-owned or operated merchant vessels. The courts originally were influenced by English decisions, which was reflected in the proposition laid down in the *Schooner Exchange* [59] that "national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by

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[58] D.W. Greig, *op. cit. supra n.*6, at p.344.

[59] *supra n.* 27.

the consent of that power from its jurisdiction." Like English decisions, decision on sovereign immunity was again based upon sovereign property. This principle had been extended later to an un-armed vessel (being sovereign's property) employed by the sovereign in the public service to one of its battle ships. The Supreme Court's decision in *Pesaro*[60] is the leading authority on this point. 'Pesaro' was owned and operated by the Italian Government in carrying goods for hire between Italian ports and ports overseas. This action was a libel *in rem* against the ship, for alleged non-delivery of consignment of artificial silk to New York.

The Italian Ambassador appeared on behalf of his Government claiming that the vessel being, at the time of her arrest, owned and in the possession of the Italian Government, was immune from transfer in the courts of the United States. The Supreme Court upheld this claim to immunity stating that the principles laid down in the *Schooner Exchange* were applicable alike to all ships, held and used by a Government for public purpose and that when, for the purpose of advancing the trade of its people, or for providing revenue for its treasury, a Government acquires, mans and operates ships in carrying trade, they are public ships in the same sense that war ships are.

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[60] 271 *U.S.* 562 (1925-26).

Republic of Mexico v. *Hoffman*[61], was a leading case on this point explaining the American view point. In this case an action *in rem* was brought against a Mexican ship 'Baja California' in respect of a collision in Mexican waters between the tow of that vessel and the 'Lottie Carson', an American fishing vessel.

During the time of collision the 'Baja California' was owned by the Republic of Mexico, but was in possession of a private Mexican corporation in pursuance of a contract which provided that the corporation should operate their vessel at its own expense and with a crew selected and paid by itself for purposes of private trade, and that 50 percent of the net profits, but no proportion of any loss should fall to the Mexican Government.

The Ambassador of Mexico to the United States claimed that the ship was entitled to immunity. The State Department certified that it recognised Mexican ownership, but refrained from certifying that it recognised ownership without possession "as a ground for immunity." The Supreme Court deduced from the practice that allows salvage lien against property belonging to, but not in possession of the United States, the rule that sovereign immunity does not require the court to arrest suit merely because the subject-matter is a publicly-owned foreign ship and it reinforced this by reference to the executive policy,

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[61] 324 *U.S.* 68 (1938).

as disclosed in the certificate.

It follows from this decision that American courts were much more subject to the direction of the executive certificate than were the English. In many instances their decisions were on the basis of the "suggestion" given by the State Department. However, the courts themselves refrained from suggesting the entitlement of a foreign government to sovereign immunity.

The American courts, unlike their English counterparts, have taken the restricted view of sovereign possession and the entitlement on the basis of it. The '*Navemar*'[62] decision by the U.S. court is a case in point. The brief facts of the case and the reasons for the decision are given below.

The *Navemar* was a vessel belonging to a Spanish company. She was affected by decree of the Spanish government while she was in Argentine waters. The Spanish Consul at Buenos Aires endorsed the ship's register that she had become the property of Spain, but did not reduce it to actual possession of the Spanish government. Instead, he permitted the ship to proceed under charter to New York. While the '*Navemar*' was discharging its cargo at New York, the master was informed by the Spanish consul, acting under instructions from the Spanish Ambassador at Washington, that "the ship of your command

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[62] 303 *U.S.* 38 (1938)

is from this date at the disposition of the Government of the Republic...." and the vessel was seized by a committee of the crew, with the support of the consul. The original owners then brought a possessory action to recover the '*Navemar*' on the ground that the Spanish decree under which the Government claimed title could not be given effect to in an American court. A decree of December 14, 1936, given in default, awarded the plaintiffs' possession of the vessel. Subsequently, the Spanish Ambassador filed a petition challenging the jurisdiction of the court on the ground that the '*Navemar* 'was a public vessel in the possession of the Republic of Spain, and therefore immune from the process of the court, and asking that the proceedings be reopened to permit the Spanish Government to appear specially to claim the ship. The matter went to the Supreme Court which allowed the respondent to intervene for the purpose of asserting the Spanish Government's ownership and right to possession of the vessel, but the court held that the Circuit Court of Appeals erred in accepting the allegation contained in the suggestion of the Spanish Ambassador as conclusive. The court said:

> The decrees of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control on behalf of the Spanish Government, was needful...or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew on behalf of their Government.

The above decision clearly turned on a restricted meaning of the word "possession". Similar approach was adopted in another important decision in *Republic of Mexico* v. *Hoffman*,[63] wherein Justice Frankfurter said:

> "Possession" is too tenuous a distinction on the basis of which to differentiate between foreign Government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls.

It seems, the United States courts' decisions were more on the basis of the indication given by the State Department, which favoured immunity on the basis of functions than on the basis of possessory title.

(i) The Tate Letter

The Tate Letter was a statement of the State Department, which was issued in May,1952. It was said in the Tate Letter that the Department has reached the conclusion that immunity should not be granted in certain types of cases, and that while a shift in executive policy could not control the courts, it was excepted that these would be less likely to allow a plea of sovereign immunity where the executive had declined to do so. It stated thus:

> Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with

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[63] *supra n.*61.

> them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.[64]

Although the Tate Letter really did no more than formulate a policy that had been quietly pursued by the State Department for some years, the courts had responded to the hints given in the certificates by the State Department. The courts had now adopted the proposition that immunity need only be granted when the State would be embarrassed if it were not, and in *National City Bank of New York* v. *Republic of China*[65], the court had deferred to the Tate Letter, which might be taken as laying down the governing principle for decision.

It may be mentioned here that the policy of the State Department is still to suggest immunity relevant on cases from attachment, even if it does not suggest immunity from suit. However, the Tate Letter offered no criteria for differentiating between a sovereign's public and private acts. It was left to the court to determine the nature of the acts, public or private, and the nature of the transaction and its purpose. One thing seemed definite that when the State Department declined to suggest immunity, the court had to reach a conclusion of its own. In *Victory Transport Inc.* v. *Comissaria Genaral*

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[64] *Department of State Bulletin*, Vol.26 (23 June, 1952) at p.981.

[65] 348 *U.S.* 356 (1955).

de Abastecimentos Y Transporters,[66] the court had mentioned the criteria by which sovereign immunity was granted in the following manner:

> Unless it is plain that the activity falls within one of the categories of strictly political or public acts about which sovereigns are traditionally being sensitive such as internal administrative act, legislative acts, or acts concerning armed forces, diplomacy or public loans, the sovereign immunity is not granted.

(ii) Immunity of Public Ships

The United States Supreme Court had avoided, for a long time, any decision on the subject till 1926. In *Berrizi Brothers* v. *Steamship Pesaro*[67] the court whole-heartedly embraced the rule that sovereign immunity extended to ships of commerce. However, this commitment had been retreated cautiously in *'Navemar'* where the court required that the ship should actually be in possession of the sovereign to claim immunity. In the *Republic of Mexico* v. *Hoffman* it had allowed suit against a publicly-owned merchant ship chartered to a private company. However, the Tate Letter was indicative of the executive's unwillingness to exempt publicly-owned trading vessels from the jurisdiction it leads us to conclude that the original 1926 rule had now been buried.[68]

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[66] 336 *F. 2d* 354, at p.360 (1964); Cert. denied 381 *U.S.* 934 (1965). For a detailed treatment of this case, see Chapter-IV, *infra* p.111.

[67] *supra n.* 60.

[68] D.P.O'. Connell, *op. cit. supra n.2,* pp.340-352.

(iii) Immunities of Government Instrumentalities

The courts in the United States approached the problems of government instrumentalities in a different way than the courts in the United Kingdom. While the courts were hesitant to accord immunity readily to trading corporations, instituted, owned or controlled by a foreign State, they unquestioningly declined against foreign State trading agencies which have not been incorporated. So the question was whether the foreign entity was an incorporated one or not. In *Bradford* v. *Director-General of Railroads of Mexico (1925)*[69] the immunity was allowed on the ground that the defendant was the head of a governmental undertaking which had no legal personality of its own although the activities carried on by the Railroads of Mexico were purely commercial in character. In another leading case *Telkes* v. *Hungarian National Museum, No.II (1942)*[70] the court sustained the immunity on the basis that the defendant was a governmental agency administered by the Ministry of Workshop and Public Education under Department of Education of Hungary. The court made it clear in this case that immunity accorded was dependant on the fact that the defendant was a department of State and not an autonomous corporation. The Appellate court observed thus:

> If the defendant is an autonomous corporate body, subject to suit, this section is maintainable, but if, on the

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[69] *A.D.* 1925-26, no.132.

[70] *A.D.* 1941-42, no.169.

other hand, the defendant is an agency or instrumentality of the Hungarian Government exercising governmental function, this suit is not maintainable.[71]

In deciding whether a government entity is entitled to State immunity, American courts do not seem to consider themselves bound by the constitutional law of the foreign State. However, the decision may depend on the following considerations.

1. If the foreign entity in question is a department of a foreign government, immunity will be upheld. Thus, in *Piascic* v. *British Ministry of War Transport (1945)*[72] immunity was given to a constituted department of the Government of the United Kingdom.
2. If a foreign entity, under its own Constitution, is a State agency and an 'analogous' government department exists in the United States, the courts will decline jurisdiction. This principle had been applied in *De Simone* v. *Transportes Maritimos Do Estado, 1920*,[73] where the immunity was accorded to the T.M.E. regarding certain sale of goods on the ground that T.M.E. was department of the Portugese Government similar to the United States Shipping Board.
3. If the State Department certifies an entity to be a

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[71] *A.D.* 1941-42, No.169, at p.581.

[72] 54 *F. Supp.* 487; *A.D.* 143-45, No.2. In this case, immunity was suggested by the State Department.

[73] *A.D.* 1919-22, No.98

departmental organ of a foreign government and recognises and allows the claim of immunity, the courts are inclined to uphold immunity without enquiring into the fact whether that entity has distinct legal personality or not or whether it is publicly incorporated or indeed whether or not it is engaged in trade in the United States of America. This over-riding principle has been stated and reiterated in the following important cases; *Miller et al* v. *Ferrocarril del Pacifico de Nicaragua (1941)*[74], *United States of Mexico* v. *Schmuck (1945)*[75] and *F.W. Stone Engineering Co.* v. *Petroleos Mexicanos of Mexico.*[76] In these cases, agencies of foreign Governments were accorded jurisdictional immunity regardless of the commercial nature of their activities in the United States and notwithstanding their separate legal existence. In all these cases the Executive had recognised and allowed the claims of immunity.

However, an important point to be noted is that the foreign entity incorporated under general corporate laws assumes the character of ordinary trading company in the eye of United States law, the courts in the United States thus hold such an entity to be an ordinary business

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[74] *A.D.* 1941-42, No.51.

[75] *A.D.* 1943-45, No.21.

[76] Lyons, "The Conclusiveness of the "Suggestion" and Certificate of the American State Department," 24 *BYIL* (1947), pp.116-147.

undertaking subject to jurisdiction of the courts. In case of the State controlled foreign corporations, subject to the principles discussed above, the courts assume jurisdiction on the basis of whether the entity in question is engaged in trading in the same manner as ordinary private trading corporations do.[77]

WAIVER AND EXECUTION

English Practice :

Waiver of immunity is an important exception to the rule of sovereign immunity from suit.

The general rule accepted in Anglo-American law is that once the sovereign submits to the jurisdiction, suit may be continued against him. This is traditionally explained on the theory that the sovereign consents to the suit.[78] The rule forms part of the courts' considerations of justice and expediency.

In normal course, submission must be at the time when the court is or about to, or is being asked to exercise jurisdiction over the sovereign, and not at any previous time.[79] Waiver may spring from a situation when the sovereign contracts to submit to the jurisdiction of a foreign court.

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[77] S. Sucharitkul, *op. cit. supra n.*34, p. 136.

[78] D.P.O'. Connell, *op. cit. supra n.*2, p.352.

[79] *Mighell* v. *Sultan of Johore* (1894),1 *Q.B.* 149.

However, an agreement to submit to the jurisdiction is not actually a submission. Even after entering into a contract to submit to jurisdiction a sovereign may resile from the contract and insist upon immunity.[80] On the same reasoning, a sovereign's submission to arbitration in terms of an agreement under Arbitration Act, 1889 was held not to be a submission to the court for the purpose of enforcement of the award.[81]

Waiver may occur, *inter alia*, in a treaty; in a diplomatic communication; by actual submission to the proceedings in the local courts; or by legislation, which establishes a public foreign trade undertaking as an autonomous economic unit with legal personality.[82]

Although waiver may be express or implied, English courts have always insisted on express waiver. They require a genuine and unequivocal submission in the face of the courts. If the foreign sovereign, or its agent, raises no objection at the time when suit commenced against him, it is still open to the sovereign to plead his immunity at a later stage, provided he can show that he had not been aware of the right of immunity he was foregoing by entering a defence to the claim or by giving security for costs, or other similar act or that

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[80] *Kahan* v. *Pakistan Federation* (1951), 2 *K.B.* 1003.

[81] *Duff Development Co.* v. *Kelantan Govt.* (1924) *A.C.* 797.

[82] Ian Brownlie, *Principles of Public International Law*, (2nd Edition, Clarendon Press, Oxford, 1973), at p.327.

his agent had acted without his knowledge. However, voluntary submission to jurisdiction does not extend to measures of execution.[83]

Contrary to the English practice of express waiver, courts in the United States, France and Italy had restricted the incidence of waiver by using the doctrine of 'implied waiver'.

According to this doctrine, a sovereign state is sometimes set to "divest itself" of the privilege of sovereign immunity, when it does certain acts, such as becoming engaged in trade. Courts infer the consent of the sovereign by the absence of its protests or by acquiescence.[84]

U.S. Practice

Under the law of the United States waiver may take place as a result of failure to raise a plea of immunity or of the sovereign itself initiating proceedings or of an agreement that the sovereign will accept the jurisdiction of the American courts.

Failure to object to the jurisdiction

In order to be effective, an objection to the jurisdiction in the Federal courts must be made:

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[83] *ibid*; See also D.W. Greig, *op. cit. supra n.* 6, at p.229.

[84] Sompong Sucharitkul, "Immunities of foreign states before National Authorities", *Recueil Des Cours*-Collected Courses of the Hague Academy of International Law, 1976 (I), Tome 149 De la collection, p.190. See also Article 8 of the Harvard Draft Convention, 1932 and reference of prior consent as a basis of waiver in Brussels Convention, 1926.

(a) before the merits of the dispute are placed in issue by the foreign state

(b) by the appropriate authorities, i.e. either through the State Department, or through the foreign state's accredited representative.

Flato Maritima Browning de Cuba v. *M. V. Cindad de la Habana*[85] is often cited as authority for the principle stated above in (a). It was held in this case that the Cuban Government had waived its immunity from suit and from execution in respect of a vessel which had been arrested in proceedings *in rem* when the government generally appeared and filed objections and answers to the libel, but did not raise a plea of immunity until three years after the original libel had been filed. The Circuit Court of Appeals was of opinion that this was a firmly established principle of law.

Similarly, for principle (b), *Victory Transport* v. *Comissaria General*[86] can be cited as an authority. In this case, a Circuit Court of Appeals held that a plea of immunity supported only by the affidavit of the Spanish Consul was specially authorised to

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[85] 35 *I.L.R.* 122.

[86] *supra n.*66.

interpose a claim of sovereign immunity.[87]

Where the foreign sovereign initiates proceedings

If a foreign State does commence proceedings, there is some authority for the proposition that the defendant in the action may, as under English law, raise a counterclaim, regardless of the amount, arising from the same subject-matter as the original claim, but, unlike English law, the defendant is entitled to raise any counterclaim against the foreign sovereign provided that the amount claimed does not exceed the amount involved in the original claim.

Although doubts exist as to the first part of the rule relating to counterclaims arising out of the same subject matter, it is clearly established that, as long as the defendant is not seeking "affirmative relief", i.e., seeking some additional remedy against the plaintiff sovereign, the defendant can always raise the plaintiff's indebtedness as a counterclaim upto the limit of the amount being claimed by the plaintiff.

In *National City Bank of New York* v. *Republic of China*[88], the Supreme Court was called upon to decide whether a claim by the

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[87] *ibid.* In a note to the judgement, the court commented (at p.359) "On appeal the Spanish Ambassador in the United States has written a letter directly to the court claiming immunity for the Comissaria General. We find it unnecessary to decide whether the procedure is sufficient to raise the claim of sovereign immunity or whether the defence has been waived through a failure to present it properly". The Spanish Ambassador was allowed to intervene in the proceedings because this did not "materially prejudice" the plaintiff.

[88] *supra n.65*

Republic of China for the sum of $200,000 deposited with the Bank by Railway Administration which was an official agency of the Republic of China, could be made the subject matter of a counterclaim of the Bank which alleged a debt of $1,634,432 on defaulted Chinese treasury notes.

The Supreme Court held that, provided the amount of the counterclaim was limited to that originally claimed by the Republic of China, the plea of immunity could not be allowed. While it was recognised that "a counterclaim issued on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity" this principle was only proof that the doctrine was not absolute, but such a limitation in respect of counterclaims "based on the subject matter" was "too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity".

Waiver by Agreement

The United States has entered into a number of international agreements which provide for submission to the jurisdiction with respect to trading operations. For example, Article XVIII(3) of an Agreement of 1951 with Israel provided:

> No enterprises of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of other Party, claim or enjoy, either for

> itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned or controlled enterprises are subject to therein.

If a State with which such an agreement had been made attempted to plead immunity in an American court with respect to its trading operations, it is certain that the State Department would intimate the court that the immunity of the defendant enterprise had been waived.

There is no conclusive authority on the proposition that immunity can be waived by private agreement, but such indirect evidence that does exist, strongly favours this view. For example, in *Victory Transport* v. *Comissaria General*[89], the Circuit court had rejected a plea of immunity on the ground that the transaction, an agreement to transport quantities of surplus wheat to Spain, was a commercial operation. It observed that a provision in the contract agreeing to arbitration in New York implied a consent to the court's jurisdiction to compel arbitration proceedings. It can be seen here that the court was going some way towards admitting that a bar to jurisdiction can be waived by agreement. The court referred to earlier authorities in which such an agreement had been held as sufficient jurisdictional basis for a court to order a foreign corporation to submit to arbitration, and for these reasons, the Circuit court saw "no reason

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[89] *supra n.66.*

to treat a commercial branch of a foreign sovereign differently from a foreign corporation".[90]

ENFORCEMENT OR EXECUTION OF FOREIGN COURT'S DECISIONS ON SOVEREIGN IMMUNITY

Enforcement or execution is a corollary to jurisdiction. As has been stated elsewhere, Anglo-American courts follow a double standard in relation to the execution of judgments vis-à-vis sovereign immunity to suits. A noted publicist, James Crawford[91], after an extensive analysis, states the law on this point thus:

> Four views of the matter would seem to be possible; first that no measures of execution are permissible without the foreign sovereign's consent; second, that the immunity from execution is strictly co-relative to immunity from suit, so that in cases where the foreign sovereign is not immune from suit, without further restriction, it is not immune from execution of any adverse judgement; third, that execution against a foreign sovereign is permissible, but in a more restrictive class of cases, than that in which it is liable to suit; and fourth, that there is no international law rule on the matter at all.

Immunity from execution involves question of actual assets pertaining to foreign states rather than assuming jurisdiction over a particular suit or case. The English practice on this matter is a corollary to its practice of sovereign immunity, that is, there will be complete immunity of execution as long as the court does not assume

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[90] *ibid*

[91] J. Crawford, "Execution of Judgments and Foreign Sovereign Immunity", 75 *AJIL* (1981), pp.820-869.

jurisdiction over a matter concerning a foreign sovereign. Even where courts assumed jurisdiction, execution was denied. This scenario has changed with the approach of the courts in dealing with cases of sovereign immunity on the basis of action *in-personam* and *in-rem.* It was in *Trendtex* case[92], first in point of time, that the execution of a decision in *action in-personam* was allowed. The same rule was applied in *Hispano Americana Mercantile S.A.* v. *Central Bank of Nigeria.*[93] However, these two decisions concerned not the execution of a final decision, but was with regard to the execution of a "Mareva" injunction (temporary injunction).

In matter of execution of decision on sovereign immunity the U.S. position is similar to U.K., as the U.S. courts adhere to general immunity from jurisdiction even in cases where commercial or trading transactions were involved. Waiver of immunity from jurisdiction did not contribute to waiver of immunity from execution, for which a distinct submission was required.[94] However, the United States did enter into bilateral treaties dealing with immunity from execution. For example, between 1948 and 1956, the United States negotiated 14 treaties of Friendship, Commerce and Navigation containing a provision dealing with reciprocal immunity; 11 of these treaties came into force. A

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[92] *supra n.*47

[93] *supra n.*49.

[94] Crawford, *op. cit. supra n.*91.

representative example is Article XVIII(3) of the United States Nicaraguan Treaty of Friendship, Commerce and Navigation of January 21, 1956.[95]

> No enterprise of either party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgement or other liability in which privately owned and controlled enterprises are subject therein.

The provision, it must be said is less helpful than might at first appear; in particular, it applies only to those government agencies and instrumentalities which can be described as "separate enterprises". Some of the treaties do not include the term "government agencies and instrumentalities" and are probably even more restrictive.[96] Apparently, the United States discontinued the practice of inserting such clauses in 1958 "at the request of the Attorney General because it made defence of suits against the United States abroad more difficult".[97] The extent to which the United States had resiled from its earlier position is clear from the much more limited clause in the (unratified) Trade Agreement with the Soviet Union of October 18,

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[95] 367 *UNTS* 3.

[96] See for the detailed analysis of provisions of U.S. treaties on execution, James Crawford, *op. cit. supra n.*91, p.826-827.

[97] F.A. Weber, "The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect", 3 *Yale Studies in World Public Order* 1, (1976) pp.80, 114.

1972, which refers only to "private, natural and legal persons of the United States".

It, thus, appears that neither the Anglo-American judicial practice nor the treaty practice of pre-statute era support a restrictive doctrine of immunity in matters of execution.

PART II

CODIFICATION
OF
SOVEREIGN IMMUNITY

CHAPTER IV

CODIFICATION OF LAW RELATING TO SOVEREIGN IMMUNITY

The development of international law of sovereign immunities through the decisions of municipal courts of diverse legal systems became an important source of confusion in the determination of the scope and extent of immunity. The courts' adherence to the restrictive theory or absolute theory has predominantly been determined by the political system and value system of the place where these theories are put in application.

Though the *jure imperii – jure gestionis* dichotomy seemed to be logically workable in theory, its application to concrete instances revealed a gray area or border line cases, wherein an activity could not strictly be declared to fall exclusively in either category. Courts of different countries treated the same activity in different ways. Thus, the operation of railways by the State has been considered by some courts to be an activity of a public-law character; while others regarded it as partaking the character of an undertaking of a private-law nature. Transactions connected with a tobacco monopoly were held by a Roumanian court to be a *jure gestionis*, while an American court came to the opposite conclusion.[1] While the activities of a State to promote

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[1] *Banque Roumaine de Commerce et de Credit de Prague* v. *Etat Polonais,* 19 *Revue droit International Prive,* (1924), p.581.

immigration were held by a Belgian court to be an act *jure imperii*, an Italian court viewed it as *jure gestionis*. A similar divergence of practice also obtained in contracts relating to supplies for the army. While Italian courts have held that a contract made by a foreign State for the purchase of shoes for its army was an act of a private – law nature and therefore outside the principle of immunity[2] a court in US decided that the same transaction constituted for the State "the highest sovereign function of protecting itself against the enemies.[3] As stated by Mann, the application of the *jure gestionis – jure imperii* distinction has resulted in government loans, shoes for the army, warships, guns, aeroplanes, even a mining concession agreement being regarded as commercial in nature.[4]

It can be seen that, the expanding notion of State activities tends to include state management of industry, state buying and state selling – though partaking the character of private – law transactions as the State acts as a public person for the general purpose of the community as a whole. This notion had gained an acceptance even in U.S. courts which was a traditional supporter of the restrictive theory. For example, in *Berizzi Brothers* v. *Steamship Pesaro*[5] when the U.S.

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[2] *Governo Rumeno.* v. *Trutta, Giurisprudenza Italiana,* (1926), part I (i), p.774.

[3] *Kingdom of Roumania* v. *Guaranty Trust Co. of New York,* (2d) 250 *Fed.*341,343.

[4] F.A. Mann, "The State Immunity Act, 1978," 50 *BYIL* (1979) p.43.

[5] (1926) 271 *U.S.* 562.

Supreme Court refused to accept the existence of an international usage which regarded the maintenance and advancement of the economic welfare of people in time of peace as any less a public purpose than the maintenance or training of a naval force, it was expressing a view not far removed from reality.

To circumvent this difficulty, M. Weiss, Judge of the Permanent Court of International Justice propounded that in determining whether an act is *jure imperii* or *jure gestionis,* regard is to be had not to the "object" of the transaction, but to its "nature"[6] The test, as suggested by Weiss, is not whether transaction aimed at achieving an object directly connected with the political functions of the state as a sovereign entity; the test is whether, irrespective of its object, the juridical nature of the transaction is such that it can be entered into by an individual. In otherwords, the fact that an individual can make contract alone is decisive. The question as to what are the objects pursued by the contract is of no consequence.

Another approach is to inquire into the "purpose" of the act[7] to determine whether the act is an act *jure gestionis* or *jure imperii.* However, a simple contract of sale may look entirely different once we start inquiring into the intended use of purchased goods. The purchase

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[6] "Competence ou incompetence des tribunaux a I'egard des Eatas 'etrangers," *Hague Recueil* 1 (1923), pp. 525-549.

[7] See J.P. Niboyet, *Traite de droit international prive francais* VI (1949), at pp. 1758-92.

of boots for the army is the classical textbook example. The problem with the purpose test is that once we start looking into underlying motives of the State, one will end up with some political purpose somewhere.[8]

However, the 'nature test' merely postpones the difficulty. To what extent is it true to say that contracts made by the State for the purchase of shoes for the army or of foodstuff necessary for the maintenance of the national economy, are not immune from the jurisdiction for the reason that they are contracts, and that an individual can make a contract? For it can also be argued that these contracts can be made only by a State and not by individuals. Because, individuals do not purchase shoes for their armies and they are not as such responsible for the management of the national economy. For these reasons discussed above, H. Lauterpacht maintains that the distinction between acts *jure gestionis* and acts *jure imperii* cannot be placed on a sound logical basis.[9] It is, thus, clear that the juridical scale developed by courts such as *jure imperii* and *jure gestionis* or tests like, 'nature' and 'purpose test' have provided no lasting solution to this vexed problem.

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[8] M. Sornarajah, "Problem in Applying the Restrictive theory of Sovereign Immunity." 31 *ICLQ* (1982), p. 669.

[9] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *BYIL* (1951),pp.220-271 at p.224.

Thus, the uncertainty caused by these decisions, the inconsistencies, and the absence of an ascertainable standard of acts *jure gestionis* capable of general application fuelled the efforts towards the codification of rules relating to sovereign immunity. Such codification efforts were aimed at side-stepping the doctrine of absolute immunity and the grant of immunity by reference to the traditional distinction between acts *jure gestionis* – acts *jure imperii*.

I. EARLIER EFFORTS TOWARDS CODIFICATION

(a) Institut de Droit International

As far back as 1891, the Institut de Droit International adopted a resolution on the jurisdiction of courts in proceedings against foreign sovereign states or heads of states. Subsequently, in 1954, the Institut adopted a new resolution on the immunity of foreign states from jurisdiction and measures of execution. According to this the *lex fori* is to determine whether or not an act is an act of sovereign authority.

(b) League of Nations

The League of Nations Committee of Experts for the Progressive Development and Codification of International Law had been considering this topic for quite some time. It felt that the topic was "ripe" for codification when it reported to the Council of the League in 1928. However, no further action was taken on this matter. Finally it

was placed in the International Law Commission's list of codification, way back in 1949.

(c) The Brussels Convention of 1926

The Brussels Convention for the Unification of Certain Rules relating to the Immunities of State-owned Vessels (1926) was the first example of an agreement to bring to fore the laws and practice of State immunities of today. The main object of the Convention was clearly to assimilate the position of State-acquired merchant ships to that of private vessels of commerce in regard to the question of immunities.[10] The limitation of immunities in shipping cases has been followed even by the courts of the countries not party to the Convention and has now become a general practice among nations.

(d) Harvard Draft Convention on Competence of Courts in regard to Foreign States, 1932

The Harvard Research has prepared a number of draft conventions, commentaries of the "Research in International Law", (RIL) of the Harvard Law School. The Harvard Draft Convention on Competence of Courts in regard of Foreign States was another significant development of the codification of law of sovereign

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[10] Article 1 provides:
"Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the states owning or operating such vessels, or owning such cargoes are subject, in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same obligations as those applicable to private vessels, cargoes and equipment."

immunity which contains three articles relating to the amenability of state and state agency to the local jurisdiction.[11]

(e) Resolution of the International Bar Association

The meeting of International Bar Association in Cologne in July, 1958, had also considered the subject of sovereign immunity. A draft resolution proposed by the American Bar Association incorporating the doctrine of restrictive immunity attracted much attention from its members. Finally, the resolution was adopted at its meeting in Salzburg in July, 1960 spelling out the circumstances in which immunity may be limited. Paragraph 1 of the resolution endorsed the restrictive principle enshrined in the Brussels Convention, 1926.

(f) The Asian-African Legal Consultative Committee

The Asian-African Legal Consultative Committee also considered the law relating to sovereign immunity as an important matter for discussion at its third session in Colombo in 1960. All delegations, with the exception of Indonesia, were of the opinion that a distinction should be made between different types of state activity, and immunity to foreign States should not be granted in respect of their activities which may be called 'commercial' or of a 'private nature'. The Committee recommended that:

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[11] For more details, see Sompong Sucharitkul, "Immunities of Foreign States before National Authorities", *Recuiel des Cours*, Collected courses of the Hague Academy of International Law, (1976 – I) at pp. 194-5.

(a) State trading organisations which have a separate juristic entity under the laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organisations and their representatives could be sued in the municipal courts of a foreign State in respect of their transactions or activities in the State;

(b) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity, if sued in the courts of a foreign State in respect of such transactions. If the plea of immunity is raised, it should not be admissible to deprive the jurisdiction of the domestic courts.[12]

II. REGIONAL EFFORTS

THE EUROPEAN CONVENTION ON STATE IMMUNITY, 1972

The establishment of the Council of Europe, provided the necessary impetus to achieve a greater harmonisation of rules relating to sovereign immunity. In the face of an overwhelming trend favouring a restrictive approach to immunity, the European States desiring to establish in their mutual relations, common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State[13], and wishing to ensure compliance with judgments given against another State, formulated the European Convention on

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[12] A. O. Adede, "The Doctrine of Sovereign Immunity under International Commercial Law : An observation on recent trends," 17 *IJIL* (1977), pp.254-6; M.K. Nawaz, "The Problem of Jurisdictional Immunities of Foreign States with particular reference to Indian State Practice", 2 *IJIL* (1962) at pp.192 – 5; 6 Whitemann's *Digest of International Law*, (Washington, 1968), at p.572.

[13] For the genesis of the Council of Europe's efforts in this regard, see I.M. Sinclair, "The European Convention on State Immunity", 22 *ICLQ* (1973), at pp.262-66.

State Immunity on May 16, 1972.[14] The study of its salient features is important for the understanding of the national codification exercise undertaken in Europe and the United States, as the Convention had a profound influence on these codification process.

Salient features of the Convention

(i) General rules of non-immunity

Articles 1 to 3 incorporate general rules of non-immunity. According to Article 1, a Contracting State which institutes or intervenes in proceedings before a court of another Contracting State, submits, to the jurisdiction of the courts of that State, and cannot claim immunity in respect of any counter claim arising out of the legal relationship or facts on which the principle claim is based.

Other general rules of non-immunity concern cases in which a Contracting State has expressly undertaken to submit to the jurisdiction of the courts of another State, whether by international agreement, by an express term contained in a contract in writing or by express consent given after a dispute has arisen (Article 2). And cases in which a Contracting State has impliedly waived its immunity by participating in the proceedings on the merits, before claiming immunity. (Article 3).

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[14] For full text see, 11 *ILM* 470 (1972).

(ii) Subject-matter jurisdiction

A fundamental issue which had to be resolved at an early stage was how to fix the borderline between cases in which immunity could be and could not be claimed. There appeared to be three possible solutions:

(a) to assimilate the foreign State to the position of the State of the forum before its own courts;

(b) to establish a list of acts *jure gestionis* and *jure imperii*.

(c) To maintain, in general, the immunity of the foreign State, except for certain defined categories of activities in relation to which the State would not enjoy immunity.

The third solution (c) is, accordingly, with some variation, the one which is reflected in the Convention. The Convention firstly sets out a number of instances in which immunity cannot be claimed (Articles 4 to 14). Interestingly, the rule recognising the entitlement to sovereign immunity is placed as a residual rule.[15] This is a unique feature of the Convention, which is in marked contrast to the approach followed by other codification exercises.

Articles 4 to 14 contain a catalogue of cases in which immunity cannot be claimed. These exemptions include:

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[15] Article 15 of the Convention states: "A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14..."

(i) Cases which relate to an obligation of the State which, by virtue of a contract, falls to be discharged in the territory of the State of the forum. (Article 4)

(ii) Cases which relate to contract of employment between the State and an individual whose work is to be performed on the territory of the State of the forum. (Article 5)

(iii) Cases which concern matters arising from the State's participation in a company, association or other legal entity. (Article 6)

(iv) Cases which relate to the industrial, commercial or financial activity of an office, agency or other establishment in the State of the forum. (Article 7)

(v) Cases which relate to a patent or other industrial property of the defendant State. (Article 8)

(vi) Cases which relate to immovable property in the forum State. (Article 9)

(vii) Case which relate to property arising by way of succession, gift or *bona vacantia*. (Article 10)

(viii) Cases which relate to redress for injury caused to the person or tangible property in the State of the forum by a wrongdoer present in such territory at the time of the occurrence. (Article 11)

(ix) Cases which relate to arbitration pursuant to a submission in writing. (Article 12)

(x) Cases which concern the administration of property in which a contracting State has a right or interest. (Article 14)

In all the above situations, the Convention provides for a 'connecting link' to establish jurisdiction of the courts of the State of

forum. Such connecting link may either require the presence of a person or property, or the performance of an action within the territory of the forum State.

(iii) Recognition and Enforcement of Judgments

A basic feature of the Convention regime is that it not only addresses questions relating to the grant of jurisdictional immunity but also issues concerning the recognition and enforcement of judgments given against a foreign State, in this regard.

For States applying a restrictive rule of immunity, the greatest difficulty had been securing execution of a judgment. There is a school of thought among jurists in countries applying the restrictive rule, that the power of execution is the consequence of the power to exercise jurisdiction. Logically too, that should have been the natural outcome. But experience demonstrates that attempts to levy forced execution on the property of foreign States situated in the territory of the State of the forum have consistently encountered vigorous diplomatic protests. Moreover the distinction between 'immunity from jurisdiction' and 'immunity from execution' has long been recognised even by those authors who uphold the restrictive view of immunity.[16]

A careful reading of the Convention would suggest that it does

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[16] *Duff. Development Co.* v. *Government of Kelantan* (1924) *A.C.* 797.

not seek to reconcile these conflicting views.[17] It rather acknowledges the difficulties inevitably when an attempt is made to distrain against the property of a foreign State in order to give effect to a judgment. It does so by establishing a basic rule prohibiting execution (Article 23) and combining it with a system, whereby the State against which a judgment is given in a foreign court (in respect of a matter falling within the catalogue of non-immunity cases i.e. Arts 4 to 14), accepts an obligation to give effect to the judgment.

The Convention system for the recognition and enforcement of judgments is contained in Articles 20 to 22. This system is based upon the concept that each Contracting State accepts an international obligation to give effect to judgment pronounced against it by courts of another contracting State. Thus, there is no machinery for direct enforcement by the courts of the State against which judgment has been given.

The Convention provides for a delicate balancing of the interests of the private litigant and the Contracting State, which is a party to the litigation. The obligation of States to give effect to judgments pronounced against it is tempered by the rule laid down in Article 20 – which offers the State certain grounds justifying a refusal to give effect to a judgment. To obviate the fear that the States could rely

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[17] For a brief overview of conflicting positions in Europe, see I.M. Sinclair, *supra n.*13, at pp.274-5.

upon an exclusive interpretation of this provision, the Convention institutes a judicial control procedure, under Article 21. Article 21 stipulates that, where a State refuses to give effect to a judgment, the affected private litigant can institute proceedings in the courts of that State, to have the issue decided, i.e. whether effect should be given to the judgment in accordance with Article 20.

(iv) Optional Regime

Article 24 permits the Contracting States to make a declaration that, in cases not falling within the catalogue of non-immunity cases, its courts shall be entitled to entertain proceedings against another Contracting State, to the extent that its courts are entitled to entertain proceedings against States not party to the Convention. Where, both the State of the forum and the State party to a litigation have made declarations under Article 24, there is an obligation to give effect to the judgments.

The optional regime was included because of the apprehensions of certain States already applying the rule of restrictive immunity, that some acts *jure gestionis* might fall outside the catalogue of cases of non-immunity, thereby restricting the jurisdiction of their courts.

(v) Exclusions

The European Convention does not apply to proceedings

concerning (i) social security; (ii) damage or injury in nuclear matter; and (iii) customs duties, taxes or penalties. The reason for excluding items (i) and (iii) was the prevailing uncertainty in some legal systems, as to whether these formed part of public or private law. Also excluded from the application of the Convention are proceedings in respect of claims relating to the operation of seagoing vessels, owned or operated by a Contracting State, to the carriage of cargoes and passengers by such vessels.[18]

Finally, there is the question of the relationship between State immunity and diplomatic and consular immunities and privileges. Article 32 of the Convention has the effect of preserving general privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts.[19]

The preceeding discussions show that the European Convention on State Immunity is the first serious effort ever made, at governmental level, to resolve the difficulties which have arisen in the past because of the disparities in state practice concerning the extent of State immunity and the circumstances in which immunity may be claimed. The European Convention is a compromise, not an adoption

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[18] These matters are governed by the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels, and by the subsequent Protocol of May 24, 1934.

[19] These are already dealt with under international law by the Vienna Convention on Diplomatic Relations of 1961; and the Vienna Convention on Consular Relations of 1963; and in bilateral agreements.

of either the absolute or the restrictive theory of immunity.[20] It deliberately does not purport to be a complete codification of general rules of international law, yet is consistent with the tendency in international law to restrict the cases in which a State may claim immunity before foreign courts.

III. NATIONAL CODIFICATIONS

A. THE STATE IMMUNITY ACT, 1978 OF UNITED KINGDOM

The evolution of the English practice on sovereign immunity, as reflected in Chapter II, is indicative of the reluctance with which United Kingdom viewed the emerging trend of restrictive immunity. This scepticism can be attributed to – the doctrine of Crown immunities and the rule of '*stare decisis*'.[21]

It is an axiom of English law that the King can do no wrong and cannot be sued in the King's own courts. This immunity had later extended to Crown properties and Crown employees as well. It is, therefore, hardly surprising that the English judges approached the issue of immunities of foreign sovereigns from the position that those sovereigns were entitled to the same immunity as their own. This,

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[20] See, Council of Europe, *Explanatory Reports on the European Convention on State Immunity* and the Additional Protocol 22 (1972).

[21] Stephan Bird, "The State Immunity Act of 1978: An English Update," 13 *International Lawyer* (1979) pp.619-43 at p.621.

coupled with the rigid application of the doctrine of precedents[22], consequently rendered the English judges more reluctant to distinguish those old precedents in favour of the new rules of restrictive immunity which were well received in other parts of Western Europe. This explains the obstinate behaviour of English courts[23] in the decisions of *Parliament Belge,*[24] *Porto Alexandre,*[25] and *The Cristina.*[26]

UK becoming signatory to the European Convention on State Immunity in 1972 had changed the scenario entirely as, in effect, it agreed that the restrictive rule of immunity would be followed. However, without an implementing legislation the courts were not able to give effect to the provisions of the Convention, or even to take judicial notice of the principles it incorporated. This predicament is aptly reflected in the decision of the Privy Council in the *Philippine Admiral case.*[27] In the instant case, although the Privy Council decided that immunity would not extend to a state-owned ship used for commercial purposes, it was reluctant to go far deeper and hold that the restrictive theory had general application under English Law.

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[22] Indeed, it was only in 1966 that the House of Lords recognized that it has the power to depart from its own previous decisions.

[23] For an evolutionary view of English judicial practice, see Chapter III, *supra* pp.

[24] (1880) 5 *P.D.* 197.

[25] (1920) at 30.

[26] (1938) *A.C.* 485.

[27] (1976) 1 *All E.R.* 78.

The opportunity declined by the Law Lords, to conform English law to the modern theory of immunity applied in other countries, was seized with apparent eagerness by the Court of Appeal, two years later in *Trendtex Trading Corporation* v. *Central Bank of Nigeria.*[28] It may be recalled that the real interest of the case lies in the fact that two of the three judges flatly declared that the restrictive theory had become part of the law of England, even though virtually every previous decision of the Court of Appeal and the House of Lords had said that it was not. The judges accomplished this by looking at the way in which international law becomes part of English law.[29] The majority accepted the doctrine of incorporation and that enabled them to distinguish all earlier precedents on the ground that they were merely declaratory of international law at that point of time, and hence no longer binding on an English court since international law had itself changed. The only problem was that this very reasoning was contrary to the decision of the Court of Appeal in *Thai-Europe Tapioca Services Limited* v. *Government of Pakistan*[30], which emphatically upheld the doctrine of transformation. And there the law remained: the Privy Council

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[28] (1977) 1 *Q.B.* 555.

[29] There are two prominent theories concerning the internalisation of an international treaty rule, namely – the 'doctrine of incorporation' and the 'doctrine of transformation'. Under the doctrine of incorporation the mere existence of a rule of international law was sufficient to make it as a part of English law. On the other hand, the doctrine of transformation argues that only a positive act – legislation or a decision of the House of Lords – would be required to complete the transformation.

[30](1975) *All E.R.* 961.

suggesting that the House of Lords would not follow the restrictive theory of immunity, and the Court of Appeal, refusing to follow its own previous decision, saying that the restrictive theory had already become part of English law.

It is at this crucial juncture, the Parliament passed the State Immunity Act in July, 1978.

Salient features of the Act

While the UK Act is largely modelled on the European Convention of 1972, one of its most remarkable feature is that it resembles more closely the Foreign Sovereign Immunities Act (FSIA) of 1976 of the United States. Apart from the varying details of the procedural aspects peculiar to the system in which it operates and the exclusion of actions *in-rem* against ships in the U.S. statute, both are virtually interchangeable.[31] The SIA has two important limiting factors. The first is section 23 which stipulates that the Act does not apply to proceedings in respect of matters that occurred before it came into force.[32] Secondly, the Act is to be construed against the background of generally recognised principles of public international law.[33]

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[31] See Stephan Bird, *op. cit. supra n.*21, at p.626.

[32] *Sengupta* v. *Republic of India* (1983) *I.C.R.* 221 (E.A.T.).

[33] *Alcom Ltd.* v. *Republic of Columbia* (1984) *A.C.* 580, at p.597.

(iii) General rule of immunity

The English statute opens with a restatement of the absolute immunity rule[34] and then proceeds to abolish that rule, for most practical purposes, by the exceptions which follow. In this regard, both the State Immunity Act (SIA) and Foreign Sovereign Immunity Act (FSIA) begin by restating the principle of sovereign immunity subject to various exceptions provided in each statute.[35] Although the exceptions provided by SIA leave little scope for application of the absolute rule of immunity, there will still be cases which do not fall within those exceptions. Those cases still require a determination of whether a particular entity is a 'state'. There are some differences in approaching this problem, between the SIA and FSIA.

Under SIA, a reference to a 'State' includes references to: (i) the sovereign or other Head of the State in his public capacity; (ii) the government of that State and; (iii) any department of that State. But the term 'State' does not include a 'separate entity', which is distinct from the executive organs of the State and is capable of suing or of being sued.[36]

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[34] Sec. 1(i) of the SIA declares that, "a state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act."

[35] On the contrary, under the European Convention, immunity instead of being the rule, is purely a residual concept.

[36] Sec. 14(1) defines 'Separate entity' to include a State's Central Bank or other monetary authority, to whose property special rules apply.

However, a 'separate entity' is entitled to claim immunity, if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State would have been so immune.

Although the corresponding definition under FSIA[37] seems to go further than SIA, the effect in practice is likely to be the same.

It may be mentioned here that the statutory provisions were not successful in removing the ambiguities completely. In such situations, the courts sought to remedy the ambiguity through an interpretative process of the legislation. In *Kuwait Airways Corporation* v. *Iraqi Airways Co. and others*[38], it was held that in order to attract immunity under Sec.14(2), the act done by separate entity had to be something which possesses the character of a governmental act and where an act done by separate entity of the State on the directions of the State did not possess that character, the entity was not entitled to state

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[37] S. 1603 (a) A "foreign state"... includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State...

(b) An "agency or instrumentality of a foreign State" means any entity-
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision therefore, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a state of the United States...nor created under the laws of any third country.

[38] (1995)3 *All E.R.* 694. The case related to seizure, by Iraqi National Airline, of aircraft belonging to Kuwait National Airline during the Gulf War. Seizure was carried out on orders of Iraqi Government and aircraft was incorporated into Iraqi National Airline's fleet. The question was whether Iraqi National Airline was entitled to claim state immunity in respect of subsequent use of aircraft as part of its own fleet. Ultimately, immunity was denied to Iraqi Airways Co.

immunity. Likewise, in the absence of such character, the mere fact that the purpose or motive of the act was to serve purposes of the State, was not sufficient to enable the separate entity to claim immunity under Sec. 14(2).

The question of State intervention in transactions of State entities continues to have been the subject-matter of litigation in U.K. Where the government of a State enterprise interferes, for example, by imposing an export ban, a trade embargo or a suspension of payments in foreign currency, the question arises whether a State entity can effectively rely on *force majeure* for an act which was simply a decision of another arm of the same State.[39] Two English cases may be cited in this regard. In *Czarnikow* v. *Rolimpex,*[40] a Polish state trading organisation (Rolimpex) had entered into contracts for the sale of considerable quantities of Polish sugar. However, due to shortfall in sugar production, the Polish Government imposed an export ban. Rolimpex claimed that the ban constituted "government intervention....beyond seller's control", as per conditions of the contract. Czarnikow argued that Rolimpex was so close to Polish State that it could not rely on its acts under this clause. The English courts, held that Rolimpex being an entity distinct from Polish State could not

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[39] See M.M. Christopher, "Piercing the Corporate veil between Foreign Governments and State Enterprises : A Comparison of Judicial Resolutions in Great Britain and the United States", 25 *Virginia JIL* (1985).p. 473.

[40] 64 *ILR* (1983) at p.195.

be held responsible for the ban in the absence of any evidence of collusion between it and the government. Lord Denning in the Court of Appeal made an important distinction between government acts for the public good and those which it does so to avoid its own liabilities under particular contracts. In the instant case, the action of the government could not, in his opinion, be considered for public good. He, nevertheless, dismissed Czarnikow's claim on the ground that Rolimpex was not a department of the government and could therefore rely on the ban - as government's intervention beyond seller's control.

In *Cubazucar* v. *INSA*[41] a Cuban state enterprise took recourse to abrupt termination of commercial relations by Cuban legislation to justify non-performance of contract of sale of sugar to a Chilean corporation. The Court of Appeal held that Cubazucar was entitled to rely on the aforesaid legislation, since it was not a department of the Cuban State but had an independent legal existence. Furthermore, there was no evidence that Cubazucar procured or connived at the enactment of the law.

It can be seen that in both these cases, the courts placed heavy emphasis on the status of the State enterprise as a legal person, but paid little attention to the type and motive of government intervention. Lord Denning's distinction between government interference for

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[41] 64 *ILR* (1983), p. 368

general political motive or for the purpose of ridding a State enterprise of an unprofitable commercial obligation is of paramount importance. Unfortunately, this distinction was deprived of any consequence in his own judgment by an excessive reliance on legal status.

(iii) The Exceptions:

The SIA's scheme of restating the absolute rule, does not affect its intended effect, namely, to formally introduce the restrictive theory of immunity into English law. Although the list of exceptions in SIA (Sections 2 to 12) seems longer, some of the exceptions are only sub-divisions of commercial transactions. The exceptions, which closely follow the European Convention are – submission to the jurisdiction; commercial transactions; employment contracts; certain torts; property claims; patents, trade marks and copyrights; membership of companies; arbitrations and admiralty proceedings, both *in-rem* and *in-personam,* relating to commercial operation of State owned ships.[42] Immunity is excluded in the case of proceedings relating to the State's interest in immovables in England or to an obligation arising from such an interest.[43] Thus, it was held by the English court in one of the cases that, the French government who were tenants of a house in London

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[42] Sec.10 of SIA. Such actions are outside the scope of the European Convention (Art.30). In this respect the Act endorses in regard to actions *in rem* the non-immunity rule formulated by Judicial Committee of the Privy Council in the *Philippine Admiral* Case and gives statutory effect, in regard to actions *in personam* , to views expressed by Lord Denning in *Thai-Europe Tapioca* case.

[43] Sec.6 (1). See also *Alcom Ltd.*, *supra* n.33, at p. 603.

which was not being used for the purpose of a diplomatic mission, did not have immunity in respect of an action by the landlords for damages sustained on account of an alleged refusal by the tenants to permit entry to carryout repairs.[44]

(a) Submission to jurisdiction (Waiver)

The common law generally looked with disfavour upon waivers of sovereign immunity. Even an explicit waiver could not, for example, be enforced against a foreign sovereign if the latter chose not to honour its agreement. Implicit waivers were similarly discouraged.[45] The SIA, however, reversed this position. Sec.2 (1) and (2) of SIA provides that a State is not immune if it has submitted to the jurisdiction of the court. Submission may take place after the cause of action arose or by a prior written agreement, which may consist of an express waiver of immunity in a contract or from the provision of a "treaty, convention or other international agreement"[46] The remaining four sub-sections of Sec.2 contain the details and the mechanics whereby a State submits to the jurisdiction by starting, or joining in proceedings. For all practical purposes, the laws of UK and US are the same in so far as submissions and waivers are

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[44] *Intpro Properties (UK) Ltd.* v. *Saurel* (1983) *Q.B.* 1019.

[45] C. Lewis, *State and Diplomatic Immunity*, (LLP Ltd., 1980) p.61.

[46] Sec. 17(2). Compare Article 2 of the European Convention.

concerned.[47]

However, unlike S.1605 of the FSIA, Sec.2(2) of SIA does not expressly state that a written waiver of immunity remains binding notwithstanding any subsequent withdrawal. In view of the language of Sec. 2(1), however, the conclusion is irresistable that submission by means of a waiver of immunity (if properly worded) must have exactly the same effect as other forms of submission, including appearance in court. Thus, the Act puts an end to the vestigial notion that waivers of immunity might be revoked and that in order to bar a State from raising immunity as a defence "actual submission before the court itself, and nothing short of that, is required".[48]

Once a State has submitted to the jurisdiction of the courts in the United Kingdom , its submission extends to any appeal and to any counter claim arising out of the legal relationship involved, or the facts on which the principal claim is based.[49]

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[47] The American Statute covers the point with pleasing conciseness :
S. 1605 (a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the states in any case-
(1) in which the foreign state waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

[48] *Kahan* v. *Pakistan Federation*, (1951) 2 *K.B.* 1003. It may be noted in the same connection that submission to arbitration in the United Kingdom is also binding, unless otherwise provided in the agreement, see Sec.9. of the Act. Therefore, *Duff Development Co. Ltd.* v. *Government of Kelantan*, (1924) *A.C.* 797, is also defunct.

[49] The statement in the text above is based on Art. 1 (2) of the European convention. Sec.2(6) of SIA is formulated in negative fashion but is to the same effect. Both provision contrast with S.1607 of the FSIA which makes a distinction between counter claims arising out of the transaction in dispute, as to which there is no limitation on amount of the counter claim, and any other counter claims, as to which relief sought cannot exceed the amount sought by the foreign state.

(b) Commercial transactions

Section 3 of the Act contains a most important provision dealing with the "commercial transactions" of foreign States. Notwithstanding specific exceptions to the principle of immunity mentioned above, section 3 has a general character. It provides in subsection (1) that a "State is not immune as respects proceedings relating to a commercial transaction entered into by the State." Commercial transaction is defined in subsection (3) of section 3 to mean:

> *(a)* any contract for the supply of goods or services;
> *(b)* any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any other financial, obligation; and
> *(c)* any other transaction or activity (whether of a commercial industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

This provision, though strongly resembles section 1603 (d) and (e) of FSIA, there are significant differences between them.

In the first place, their scope is not the same. As evidenced by section 1603(e) and other provisions of the Foreign Sovereign Immunities Act, the American Act is intended to apply to the activities of foreign States taking place, or having direct effect, in the United States. Section 3 of SIA contains no such limitation. Thus, it may apply to activities carried out by a foreign State outside the United Kingdom, but which, by reason of rules of transaction jurisdiction, might be the object of proceedings in the courts of the United Kingdom. (Although

the provision on contract obligation provides that they have to be performed at least partly in the United Kingdom.)[50]

Secondly, section 3 is much more specific than Section 1603(d). In effect, the "definition" found in Section 1603 is no more than an admonition to the courts to base their decisions on the "nature" rather than the "purpose" of the foreign state's activity, and the ultimate determination in each case is surrendered to the judiciary. Section 3 of SIA shows no such timidity. The British Act categorically solves the issue of characterisation in respect of two of the most frequent transactional activities of foreign States, viz., those arising out of contracts for the supply of goods and services; and those relating to loans or similar financial transactions concluded by foreign State.[51] Moreover the comprehensive wordings of section 3(2)(c) afford the courts some guidance by listing the type of activities most likely to fall within the "commercial" category. Hence, neither the purpose for which the goods or services are wanted nor the fact that the contract or loan is the one that could only be made by a governmental entity is relevant. A contract for the supply of cement for army barracks (as *in*

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[50] Section 3(1); see also R. Higgins, "Certain Unresolved Aspects of the Law of State Immunity", 29 *NILR* (1982) p. 272; H. Fox, "Enforcement Jurisdiction, Foreign State Property and Diplomatic immunity", 34 *ICLQ* (1985), p. 118.

[51] See Georges R. Delaume, "The State Immunity Act of the United Kingdom", 73 *AJIL* (1979) at p.191. It may be noted that Section 3(3) (b) of SIA applies not only to direct loans and borrowings but also to other means of providing finance and to guarantees. This avoids the uncertainties that were so characteristic of the treatment of the "public debt" of foreign States in the various drafting stages of the Foreign Sovereign Immunities Act.

Trendtex case) or of military equipment or of technicians to train soldiers to use it would come within Sec.3(3)(a). A loan to or by a Government would similarly fall within Sec.3(3)(b), as would the letter of credit in the *Trendtex* case. In the case of "any other transaction or activity"[52] in the sense of Sec.3(3) (c), a court will have to decide whether it results "from an exercise of sovereign authority".

As regards the other specific exceptions mentioned above, it suffices to state that these activities are basically commercial and are afforded separate treatment in the statute primarily because they are so treated in the European Convention.

(iii) Torts

One difficulty which can arise regarding a tortious act crossing national boundaries, under private international law, is deciding which country and what law should govern the proceedings. The choices are between the place where the act occurs and the place where the damage is incurred. The British statute comes down firmly in favour of the place of commission, as it states under Sec. 5 of the Act thus:

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[52] Mann, *op. cit. supra* n.4, argues that the word "activity" allows claims in tort to be brought against a State where they do not result from an "exercise of sovereign authority". Thus, a claim in libel, such as that in *Krajina* v. *Tass Agency* (1949) 2 *All E.R.* 274 could not be met by a defence of State immunity unless the tort was committed "in the exercise of sovereign authority", For another example of an "activity" that would probably come within Sec.3(3) (c), see the facts of *US* v. *Dollfus Mieg* (1952) *A.C.* 582. Sec.3(1)(b) adds to Sec 3(1) (a) by denying immunity in certain non "commercial transaction" cases in contract.

A state is not immune as respects proceedings in respect of –

(a) a death or personal injury; or

(b) damage to or loss of tangible property caused by an act or omission in the United Kingdom.

Sec.5 mentions only injury or damage to tangible property, rather than torts in general. As a result, States would retain their absolute immunity if a tort were concerned with intangible property, such as contractual rights, or industrial property, such as trade secrets and know-how. A similar situation prevails under U.S. law, where absolute immunity is preserved for interference with contractual rights. The point of departure of FSIA[53] is that it chooses the place where damages occur, while English law favours the place of commission as a criteria for ascertaining the sovereign immunity arising from tortious act.

(iv) Property (Indirect Impleading)

Sec.6(4) deals with indirect impleading i.e., the situation in which proceedings are brought against someone other than the State but which concern property within a State's ownership, possession or control. A defence of State immunity is allowed in such a case under Sec.6(4) only if the defence would be available if the proceedings had been brought against the State itself.

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[53] Sec. 1605(a)(5).

(v) Ships

The Brussels Convention of 1926, purporting to be a unification of certain rules, was in two respects far ahead of its time. First, it refused to draw any distinction between ships in public use and those operated for commercial purposes. Second, it envisaged actions *in-personam*. Although this Convention was signed by the United Kingdom in 1926, it had still not been ratified when the Privy Council decided *Philippine Admiral* in 1976. In *Philippine Admiral* the Convention was referred to in their Lordships' review of international law, but their judgment, confining the exemption from immunity to ships used for commercial purposes, did not accept that the Convention, even in 1976, accurately stated the prevailing view of contemporary international law. When the U.K. legislature amended the law and thereby enabled U.K.'s ratification to the Brussels Convention, it included actions *in personam*. Sec.10 of SIA, in this regard reads:

> Sec.10(1) This section applies to-
>
> (a) Admiralty proceedings; and
>
> (b) Proceedings on any claim which could be made the subject of Admiralty proceedings.
>
> (2) A State is not immune as respect-
>
> (a) an action *in rem* against a ship belonging to that State; or
>
> (b) an action *in personam* for enforcing a claim in connection with such a ship, if at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

The phraseology "intended for use" has been criticised for introducing a subjective test of a government's intention and all the difficulties it will entail.[54] It is quite interesting to note the confirmed reference to intention even after the Privy Council enumerated some of those difficulties when rejecting the "intention" test in *Philippine Admiral*:

> It is, of course, possible that a foreign sovereign might base a claim to immunity for a trading vessel on its alleged intention to use her in the future for some different, and undoubtedly, public, purpose. If such a claim were made the court would be faced with several difficult questions, e.g., whether it would require any evidence of the intention over and above its mere assertion; whether the fact that it was formed in order to defeat the plaintiffs' claim would be a relevant consideration; and what time such a claim would have to be formulated to be listened to at all.[55]

In the United States, the legislature has approached the question of ships in quite different manner. It is now one of the very few, if not the only, country which will not allow an action *in rem* against a state-owned ship, and it goes so far as to penalize anyone who attempts to pursue an action *in rem,* rather than use the now mandatory form of an action *in personam.*[56]

(vi) Execution:

The SIA, although based on the European Convention, goes

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[54] See Stephan Bird, *op cit. supra n.*21, at p.635.

[55] *supra n.*27.

[56] Sec.1605(b) of FSIA.

further and adopts a more realistic approach in the matter of execution.[57]

The Act provides that relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property, and that the property of a State shall not be subjected to any process for the enforcement of a judgment or arbitration award or, in an action *in-rem,* for its arrest, detention or sale.[58] The immunity from injunctive relief and execution is subject to two important exceptions. First, such relief may be given or process may be issued with the written consent (which may be contained in a prior agreement) of the State.[59] Secondly, the immunity from process does not prevent the issue of any process in respect of property which is for the time-being in use or intended for use for commercial purposes.[60] Thus, execution cannot issue against a credit balance on a

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[57] See Higgins, "Execution of State Property: United Kingdom Practice", 10 *NYIL* (1979), p.35; H. Fox, *supra n.*49, at p.115; James Crawford, "Execution of Judgments And Foreign Sovereign Immunity", 75 *AJIL* (1981), p.820; Robert K. Reed, " A Comparative Analysis of the British State Immunity Act of 1978", Vol.III(1), *Boston College International and Comparative Law Review* (1979), p.175.

[58] Sec.13(2). This immunity applies to a State's Central Bank or other monetary authority even if it is a "separate entity" under Sec 14(4).

[59] Sec.13(3). A submission merely to the jurisdiction is not to be regarded as a consent to execution.

[60] Sec.13(4) But this exception does not apply, otherwise than in actions *in-rem*, to States which are parties to the European Convention on State Immunity unless the process is for enforcing a judgment which is not subject to appeal or (if a default judgment) liable to be set aside, and the State has made a declaration under Art.24 of the Convention (which provides that a Contracting State may declare that its courts shall be entitled to entertain proceedings against Contracting States to the extent that its courts are entitled to entertain proceedings against non-Contracting States), or the process is for enforcing an arbitral award.The certificate of the Secretary of State as to whether a State is a party to the European Convention or has made a declaration under Art.24 is conclusive. [Sec.21(c)]

bank account kept by a foreign State for the purpose of meeting the ordinary expenditure of its embassy; but it may issue where the account was earmarked for the discharge of liabilities incurred in commercial transactions.[61]

A central bank or other monetary authority is accorded special treatment under the Act. If it is not distinct from the executive organs of the State and not capable of suing or being sued, it will be on precisely the same footing as a State, but if (as is more likely to be the case) it is a separate entity within the meaning of the Act, it will differ from the other separate entities in the following respects: first, even if it is not entitled to immunity from suit, its property will normally be immune from execution because the property of a central bank or other monetary authority, is not regarded as in use or intended for use for commercial purposes;[62] secondly, it is specifically provided that where a central bank or other monetary authority is a separate entity it is entitled to immunity from injunctive relief and execution as if it were a State.[63] In practice, therefore, the property of a State's central bank will only be liable to process of execution if it has waived, in writing, its immunity from execution.[64]

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[61] *Alcom Ltd.* supra n.33, at pp.580, 604.

[62] Sec14(4).

[63] *ibid.* It is also entitled to immunity from penalty in respect of failure to disclose or produce documents or information.

[64] Sec.13(3).

The foregoing discussions reveal that the most characteristic feature of SIA, in comparison with the European Convention is that the former is increasingly comprehensive and capable of ensuring certainty of results. This is particularly apparent from the SIA provisions concerning "commercial transactions" of States. For the first time, in the history of codification of modern doctrine of immunities, the Act provides unequivocal defence of the most frequent commercial activities of States. These provisions, together with the co-related treatment of State property used for commercial purposes and of waivers of immunity, is of utmost significance, for it removes the subject from the realm of speculation to certainty.

In England it is no longer necessary, before coming to the merits of the case, to have preliminary clearance of jurisdiction hearings which were largely confined to more esoteric points of the law of precedence. The purpose of the statute is to clarify an area of law which, for different reasons, may have become uncertain and unpredictable. The goal is to allow the law in each country to accord with the existing standards of international law, and in this regard it can be safely asserted that the SIA is a success. Although one may point to occasional ambiguities or some gaps in the statute, such imperfections are not a comment on the statute, but is an uncertain feature of any legal system that addresses a subject situated in the

interstices of the public law - private law domain. The task of infusing clarity and laying down objective criteria of interpretation has been largely a matter, which has admirably been discharged by the courts in England.

For the purpose of our study, it would not be pertinent to enumerate the judicial exercise of interpretation that followed the adoption of SIA, but it suffices to state that the application of the common law principles, relating to the sovereign immunity in statutory form, has assisted both the courts and the parties as to the form and remedies available in the matter pertaining to a foreign state.

C. FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA), 1976

As has been stated elsewhere, for about a century and a half, following the decision of the U.S. Supreme Court in the '*Schooner Exchange* v. *McFaddon*'[65] (1812), the absolute theory of sovereign immunity prevailed in the United States. Far from accepting the absolute theory, this case laid down the procedure that a suggestion and a certificate of the Department of State to the effect that it recognises and accepts a foreign government's claim of sovereign immunity is binding upon the U.S. courts.

The Supreme Court had an opportunity in the *Berizzi Brothers* v.

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[65] 7 *Cranch* (1812) 116.

Pesaro[66] to depart from the *Schooner Exchange* decision. But it declined and upheld the dismissal to an action brought against a merchant vessel for failure to deliver a cargo from Italy to New York on the sole ground that the vessel was owned by the Italian Government. However, between 1943 and 1945 in two of its important decisions – *Ex-parte Republic of Peru*[67] and *Republic of Mexico* v. *Hoffman*[68] - involving merchant vessels, the United States courts paved the way for the abondonment of the absolute theory. More particularly, in *Hoffman's* case, the Department of State declined to express any opinion on whether or not immunity should be granted. The Supreme Court, noting that the Department of State had refrained from certifying that the defence of sovereign immunity was not available against the claimants, made the following observation:

> We can only conclude that it is a national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent, which the Government, although often asked, has not seen fit to recognise.

Following this, the Department of State saw the need to formulate a standard for immunity of foreign government. This took the form of a letter written by Jack B. Tate, Acting Legal Adviser of the

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[66] (1925-26) 271 *US* 562.

[67] 318 *U.S.* 578 (1943)

[68] 324 *U.S.* 39 (1945)

Department of State, published in the Department of State bulletin.[69] In the Tate letter, the Department of State announced that it would, from that time, abandon absolute theory and adopt restrictive theory of immunity. Accordingly, the Department of State took the position that "the immunity of the foreign state is recognised with regard to sovereign or public acts, *jure imperii* of States, but not with respect to the private acts, *jure gestionis*".

However, in the absence of executive suggestion, the court had to decide in accordance with the circumstances of each case. The decision in *Victory Transport Inc.* v. *Comissaria General de Abas tecimentos Y Transportes* throws more light on this point. The facts of the case were as follows. The Spanish Ministry of Commerce had chartered Victory Transportes ship to carry US surplus wheat to Spain, and the ship was damaged in a Spanish port, which was unsafe to handle cargo vessels. Service was made by registered mail under US procedures and Victory sued to have arbitration, as provided in the charter contract. The Spanish Ministry's Shipping Branch appeared specifically to move to vacate service and dismiss the suit because of sovereign immunity.

It must be noted that at that point of time, there were two ways in which a sovereign defendant could move to dismiss a suit on

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[69] Department of State Bulletin, Vol.26 (23 June,1952) 981. For further details, see Chapter III, text corresponding to n.64, p.58.

grounds of sovereign immunity. First, it could request the Department of State to make a "suggestion" as to its immunity to the court stating that it "recognised and allowed" the immunity of the sovereign. If the State Department did so, the court was obliged to dismiss the complaint. Second, the defendant could appear directly in the court and plead sovereign immunity as defence, seeking to dismiss the complaint. As, in the instant case, there had been no communication from the State Department, the court had to decide for itself whether it is the established policy of the Department to refuse claims of immunity of this type. It found the task difficult, since the Tate letter offered no guidelines for distinguishing between a sovereign's public and private acts. The court was required, given the confusion that existed in applying the 'nature' or 'purpose' test to characterising an activity as commercial, to formulate a satisfactory method of differentiating between acts *jure imperii* and acts *jure gestionis,* when the State Department had been silent on the question of immunity in a particular case.

In such a scenario the court attempted to balance the interest of individuals in having their legal rights determined by courts, with that of foreign governments in being free to perform certain political acts, without undergoing the embarrassment of defending the propriety of such acts before foreign courts.

Accordingly, the court held:

> Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases. The State Department's failure or refusal to suggest immunity is significant. We are disposed to deny the claim of sovereign immunity that has not been recognised and allowed by the State Department unless it is claimed that the activity in question falls within one of the categories of strict political or public acts[70] about which sovereigns have traditionally been quite sensitive.

The State Department was less than enamoured of the court's decision, despite the long distance, the court had gone towards making the restrictive theory more meaningful and concrete, than the vaguer contours of the Tate letter. Both the State Department and the losing Spanish Government sought a review of the decision by the US Supreme Court, which that Court refused.

Thus, the difficulties stemming from the dual method of determining sovereign immunity – first by a suggestion from the State Department and secondly by a direct appearance before the court – and also the uncertainty faced by the courts in characterising the commercial activity led to the adoption of the Foreign Sovereign Immunities Act in 1976.

Salient features of the Act

The FSIA sought to codify the substantive law of sovereign

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[70] The political and public acts have been enumerated in this decision itself, which is akin to the exceptions as enumerated by Lauterpacht, in Chapter II, *supra n.*36, p.24.

immunity in the United States[71], and while also modifying it in certain respects, an important goal was to make the application of such law more uniform, fair and hence predictable, by relieving the Department of State of the responsibility and possible diplomatic repercussions of determining claims of such immunity, and remitting them exclusively to judicial determination, preferably in Federal courts.[72]

The FSIA, limiting the role of the Executive in suits against foreign government, now provides that claims of foreign States to immunity are to be decided by the courts.[73] The FSIA, however, does not preclude the State Department from filing with a court its suggestions about the granting of immunity. In its first such intervention since the enactment of FSIA in 1976, the State Department argued successfully in *Jackson* v. *Peoples' Republic of China*[74] that the FSIA should not be applied retrospectively to permit American bond holders to sue the Peoples' Republic of China in the United States on 1911 Imperial Chinese Government Railway Bonds.

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[71] *H.R. Report No.*1487, 94th Cong; 2d Session 7-8 (1976)

[72] Statement of CN Brower, Legal Adviser to the Department of State, *Hearings on Immunities of Foreign States*, House of Representatives Committee on the Judiciary, Serial No.10, June 77, 1973, at p.14-28; Georges R. Delaume, "Sovereign Immunity in America: A Bicentennial accomplishment", 8 *J.MAR. L.* (1977) 349; Georges R. Delaume, "Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976", 71 *AJIL* (1977) 399; Von Mehren, "The Foreign Sovereign Immunities Act of 1976", 17 *Colum. J. Transnat' L* (1978); and Foreign Sovereign Immunity Act, Internet Source: *http:1/travel.State.gov/fsia.htm*

[73] Section 1602 of FSIA.

[74] 596 *F. Supp.* 386 (N.D. Ala. 1984)

General rule

Sec. 1604 of FSIA lays down the general rule that, "a foreign State shall be immune from the jurisdiction of the courts of the United States, except as provided in this chapter". Such exceptions, besides "commercial activities", include more specialised areas of non-immunity. Thus, no immunity exists whenever:

(a) a foreign State has waived its immunity, explicitly or by implication.
(b) rights in property "taken in violation of international law" are in issue and that any property exchanged for it is present in the US in connection with commercial activity carried on in the US by the foreign State;
(c) rights in property in the US acquired by succession or gift of rights in immovable property situated in the US, are in issue;
(d) money damages are sought for personal injury or death, or damage to or loss of property, occurring in the US and caused by the tortious act / omission of the foreign State or any official or employee acting within the scope of his employment.

State and Its Instrumentalities

The FSIA provides, in Section 1608, that a "foreign state" includes a political subdivision of such a State and its agencies or instrumentalities. This is defined to mean any entity which is a separate legal person and which is an organ of a foreign State or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign State and which is neither a

citizen or a State of the United States nor created under the laws of any third country. This definition of agencies and instrumentalities therefore affords prime importance to their legal status under the law of the country, in whose name it seeks immunity. This method, as distinct from British SIA, grants *prima facie* immunity, *inter alia,* to entities which are legally quite independent. Some writers are of the view that, when the various exceptions to immunity are applied the net result is likely to be similar as under SIA.[75]

However, the issue of legal personality has occasioned problems and some complex decisions. The very first case in which the issue arose presented perhaps the most complicated border line question imaginable.[76] It involved the difficult distinction between socialist property and State property in Yugoslavia. The defendant, a "workers association" argued that it was neither an organ of Yugoslavia nor owned by the State. The plaintiff claimed that all socialist property has to be equated with State property. The court, beset with the dilemma of having to pronounce on intricate questions of socialist property law, rejected altogether the criterion of a foreign State's system of property ownership. Rather it looked at the degree to which the entity discharged governmental functions and at the extent of the

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[75] Christoph H. Schreuer, *State Immunity: Some recent Developments.* (Cambridge, Grotius Publication Ltd., 1988)

[76] *Edlow International Company* v. *Nuklearna Elektrana Krsko,* 63 *I.L.R.* (1982) p.100.

State control over its operations - two criteria which are simply not provided for under the FSIA. On this basis it reached the conclusion that defendant organisation was not an agency or instrumentality of the foreign State.

After this inauspicious beginning, subsequent American cases dealing with socialist State entities did not create comparable difficulties. In one case against the Soviet press agency TASS and Novosti[77] the status of TASS, an organ of the State was accepted on the basis of the Soviet Ambassador's certificate, while Novosti was classified as an "agency or instrumentality" mainly because 63% of the property which it controlled was owned by the State. In other cases the nature of socialist state trading[78], shipping[79] and tourist organisations[80] as agencies or instrumentalities was simply accepted without much discussion.

In a similar way, state enterprises of other States were accepted as agencies or instrumentalities on the basis of the ownership test provided for by the FSIA without much difficulty. For example, this test was successfully applied to State-controlled oil

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[77] *Yessenin Volpin* v. *Novosti Press Agency, TASS* et. al., 63 *ILR* (1982) p.127.

[78] *East Europe Domestic International Sales Corp.* v. *Terra*, 63 *ILR* (1982) p.235; *S & S Machinery Co.* v. *Masinexportimport*, 706 *F. 2d* 411 (2d Cir. 1983).

[79] *Paterson Zochonis* v. *Compania United Arrow*, 63 *ILR* (1982), p.354; Case note in 14 *Vanderbilt J. Transn L.* (1981), p.637.

[80] *Harris* v. *Intourist*, 63 *ILR* (1982), p.318.

companies.[81] Further more, shipping lines owned by foreign States were either classified as "a separate legal person which functions as an organ of a foreign State or political subdivision thereof"[82] or simply as "agencies or instrumentalities."[83]

In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*[84], the Supreme Court suggested a presumption of separativeness for State entities, under which their separate legal personalities were to be recognised, unless applicable equitable principles mandated otherwise or the parent entity so completely dominated the subsidiary as to render it an agent of the parent.[85]

As regards immunity to private acts of former Heads of States, in *Republic of the Philippines* v. *Marcos (No.1)*[86], the US Court of Appeals for the Second Circuit held that the Marcoses, the deposed leader of the Philippines and his wife, were not entitled to claim sovereign immunity, but went on to note that even if they were to have standing, it was uncertain that the immunity of a foreign State would go so far as to render a former Head of State immune as regards his

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[81] *Carey* v. *National Oil Corporation*, 63 *ILR* (1982), p.164; also see 63 *ILR* (1982),p.232 at 234; *Matter of Sedco*, 543 *F. Supp.* 561 (SD. Tex 1982).

[82] *Jet Line Services Inc.* v. *M/v Marsa el Hariga*, 63 *ILR* (1982), p.214 at 221.

[83] *Velidor* v. *L/P/G. Benghazi*, 63 *ILR* (1982), p.622; *Williams* v. *The Shipping Corp. of India*, 63 *ILR* (1982) p.363. *In the matter of the Complaint of Rio Grande Transport Inc.*, 63 *ILR* (1982), p.604 at 606.

[84] 80 *ILR*, p.566.

[85] See also *Foremost–McKerson Inc.* v. *Islamic Republic of Iran*, 905 *F. 2d*, 438 (1990)

[86] 81 *ILR*, p.581.

private acts. In a further decision on the same general issue of immunity and the Marcoses, the Court of Appeal for the Fourth Circuit held in *In Re Grand Jury Proceedings*, Doc. No.770[87] that Head of State immunity was primarily an attribute of State sovereignty, and not an individual right, and that full effect should be given to the revocation by the Philippines Government of the immunity of the Marcoses.

Exceptions

(a) 'Commercial Activity' Exception

Sec. 1603(d) of FSIA defines "commercial activity" as a "regular course of commercial conduct or a particular commercial transaction or act." It is also noted that the commercial character of an activity is to be determined by reference to the 'nature' of the activity rather than its 'purpose'. The US courts have held that the purchases of food were commercial activities[88], as were purchase of cement[89], the sending by a Government Ministry of artists to perform in the US under a US impresario[90], and activities by state airliner.[91]

The issuance of foreign governmental treasury notes has also been held to constitute a commercial activity, but one which once

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[87] 81 *I.L.R.*, p.599.

[88] See *Gemini Shipping* v. *Foreign Trade Organisations for Chemicals and Foodstuffs*, 63 *ILR* p.569; and *ADM Milling Co.* v. *Republic of Bolivia*, 63 *ILR*, p.56.

[89] *NAC* v. *Federal Republic of Nigeria*, 63 *ILR*, p.137.

[90] *United Euram Co.* v. *USSR*, 63 *ILR* p.228,

[91] *Argentine Airlines* v. *Ross*, 63 *ILR*, p.198.

barred by passage of time cannot be revived or altered.[92]

The purchase of military equipment by Haiti for use of its army[93], and a military training agreement whereby a foreign soldier was in the US, were held not to be commercial activities.[94]

It has also been decided that Somalia's participation in an Agency for International Development Programme constituted a public or governmental act.[95] While the publication of a libel in a journal distributed in the US was not a commercial activity, where the journal concerned constituted an official commentary of the Soviet Government.[96]

Connections of the commercial activity to the forum State

The requirement of a sufficiently close connection of the claim with the forum State for courts to assume jurisdiction is a problem which frequently arises in all cases with transnational elements. But in claims against foreign States the differences from country to country in the availability of remedies and of assets for enforcement are a particularly strong incentive to go forum shopping and to start

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[92] *Schmidt* v. *Polish People's Republic*, 742 *F. 2d.* 67 (1984)

[93] *Aerotrade Inc.* v. *Republic of Haiti*, 63 *ILR*, p.41.

[94] *Castro* v. *Saudi Arabia*, 63 *ILR*, p.419.

[95] *TransAmerican Steamship Corp.* v. *Somali Democratic Republic*, 767 *F. 2d* 998. This is based upon the legislative history of the 1976 FSIA Act, See the *H.R. Rep.* No.1487, 94th Cong., 2d Sess. 16 (1976).

[96] *supra n.*77.

proceedings in countries with only tenuous or no connections to the commercial activity concerned. This is the reason that the question of a sufficient nexus from local jurisdiction arises so frequently in state immunity cases.

The British SIA's reference to commercial transactions requires no connecting link to Britain, although the provision on contract obligations provides that they have to be performed at least partly in the United Kingdom.[97]

The FSIA under Sec.1605(a)(2) offers three alternative connecting points to the commercial activity of foreign States[98]. They are:

1. commercial activity carried on in the United States by the foreign States;
2. an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or
3. an act outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere if that act causes a direct effect in the United States.

The scope of section 1605 (a)(2) has been the subject-matter of litigation in innumerable instances.

In *Zedan* v. *Kingdom of Saudi Arabia*[99], the US Court of Appeals in discussing the scope of section 1605 (a)(2) emphasized that the

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[97] Sec.3(1) of SIA. See also H. Fox, *supra n.*50, at p.115, 118.

[98] C. N. Brower, F.W. Bistline, G.W. Loomis, "The Foreign Sovereign Immunities Act of 1976 in Practice", 73 *AJIL* (1979), p.200; Georges R. Delaume, "Long-Arm jurisdiction under the Foreign Sovereign Immunities Act," 74 *AJIL*(1980), p. 640.

[99] 849. *F. 2d* 1511 (1988)

commercial activity in question taking place in the US had to be substantial, so that a telephone call in the US which initiated a sequence of events which resulted in the plaintiff working in Saudi Arabia, was not sufficient. Additionally, where an act is performed in the US in connection with a commercial activity of a foreign state elsewhere, this act must in itself be sufficient to form the basis of a cause of action, while the "direct effect" in the US provision of an act abroad in connection with a foreign state's commercial activity elsewhere was subject to a high threshold. As the court noted, in cases where the clause was held to have been satisfied, "something legally significant actually happened in the United States".[100] This rule has been referred to in later decisions as the 'rule of substantial contact'.

A permanent representation of the defendant in the United States through an office[101] and the regular operation of flights in the United States[102] fulfilled the requirements of substantial contact. A publication of invitation to bid in the US[103], substantial contractual

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[100] In this connection the following cases were cited as precedent for this ruling: *TransAmerican Steamship Corp.* v. *Somali Democratic Republic*, *supra n.*95, where demand for payment in the US by an agency of the Somali government and actual bank transfers were held to be sufficient, and *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F. 2d 300, 310 (2d Cir. 1981), where refusal to pay letters of credit issued by a US bank and payable in the US to financially injured claimant was held to suffice.

[101] *Behring International Inc.* v. *Imperial Iranian Air Force*, 63 *ILR* (1982),p.261; *Italian International Bank Ltd.* v. *Banco Industrial de Venezuela C A.*, No.86 Civ.5288 (PNL)(SDNY 1984).

[102] *Sugarman* v. *Aeromexico.* , 63 *ILR* (1982), p. 446.

[103] *Gemini Shipping Inc.* v. *TAFCO*, 63 *ILR* (1982),p.494.

negotiations in the US[104] and arrangements for the transport of goods purchased in the US[105] were all sufficient to qualify as commercial activity in the US. On the other hand, isolated meetings in the US of uncertain scope and importance[106], or mere contacts by telex were not regarded as sufficient. Nor did a promissory note payable in New York[107] or the establishment of a letter of credit through an agent in the US amount to commercial activity in the United States.[108]

In the context of imports into the US, a permanent business relationship with the importer, over whose conduct a measure of control was exercised, was sufficient to amount to substantial contact.[109] Where products had reached the US without the involvement of the defendant State, there was no substantial contact.[110] The purchase of goods in the US by the foreign State also fulfilled this requirement.[111]

The most difficult problem in applying the substantial

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[104] *Gibbons* v. *Udaras na Gaeltachta,* 549 *F. Supp.* 1094 at 1113 (SDNY 1982); *Schmidt* v. *The Polish People's Republic,* 570 *F. Supp.* 23 at 27 (SDNY 1984), confirmed for other reasons:742 *F.2d* 676 (2d Cir. 1984)

[105] *Ministry of Supply, Cairo* v. *Universe Tankships Inc.*, 708 *F.2d* 80 (2d Cir. 1983).

[106] *Maritime International Nominees Establishment* v. *Republic of Guinea,* 693 *F. 2d* 1094 (D.C. Cir. 1982), Cert., Denied 104 *S. Ct.* 71 (1983).

[107] *Exchange National Bank of Chicago* v. *Empresa Minera del Centro del Peru,* S.A. 595, *F. Supp.* 502(SDNY 1984).

[108] *Verlindren B.V.* v. *Central bank of Nigeria,* 63 *ILR* (1982), p.390.

[109] *Ohntrup* v. *Firearms Center Incorporated,* 63 *ILR* (1982), p.632.

[110] *Yessenin Volpin, supra n.*77.

[111] *Gibbons, supra n.*104, and *Ministry of Supply, supra n.*105.

contact test had turned out to be the proximity of a claim to an existing commercial activity in the US. Where a claim arose in the context of unloading in the port of the purchasing State, of goods bought in the US - this was still seen as an integral part of the commercial activity in the US.[112] Also, a contract for the transport of goods purchased in the US was seen as part of the underlying commercial activity and was therefore not immune.[113] On the other hand, the booking of a hotel room in Moscow through the office of the Soviet travel agency Intourist in New York was not accepted as sufficient to link the damage from a hotel fire to Intourist's commercial activity in the US.[114]

Torts

The FSIA withdraws immunity in cases of personal injury or death or damage to or loss of property caused by the tortious act or omission of the foreign State. However, it adds two rather special exceptions: one exception refers to the foreign State's "discretionary function", the other to claims arising out of malicious prosecution, abuse of process, libel, slander,

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[112] *ibid, n.*105.

[113] *Gemini, supra n.*103

[114] *Harris, supra n.*80

misrepresentation, deceit, or interference with contract rights.[115]

As has been mentioned earlier in a case against Novosti and TASS, the court dismissed the claim because it was directed at damages for libel.[116] In another case, a claim against the Soviet State Concert Society could not be based on the torts exception to immunity because of FSIA's explicit exclusion of interference with contract rights.[117]

In Letelier v. *The Republic of Chile*[118], which concerned the political assassination of a former Chilean politician and a companion by agents of the Chilean Secret Service in the United States, Chile denied any responsibility but it argued further that even if it had been involved, immunity should be upheld since the torts exception in the FSIA was limited to private torts like motor accidents but did not extend to public acts like political assassinations. The US Court clearly rejected this argument, holding:

> Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as "private"....[119]

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[115] The motive for these exceptions was to adapt this provision to those of the Federal Tort Claims Act dealing with the immunity of the US Government. See House Report, reproduced in 15 *ILM* (1976) p.1398at 1409.

[116] *Yessenin Volpin, supra n.*77.

[117] *United Euram Co., supra n.*90, p.228.

[118] 63 *ILR* (1982),p.378; case notes in 21 *Harvard ILJ* (1980),p.793; 21*Virginia JIL* (1981) p.251; 7 *Brooklyn JIL* (1981),p.465.

[119] 488 *F. Supp.*671.

The Court also addressed the question whether the activities at issue could be described as "discretionary function" in the sense of the FSIA. It found that:

> There is no discretion to commit, or to have one's officers or agents commit, an illegal act.[120]

Therefore, immunity was rejected, the evidence presented at the trial implicating Chile was accepted, and substantial damages were awarded.[121]

This rejection of a public acts exception to the torts rule in the FSIA was later confirmed by an Appeals Court. This case concerned the crash of an aeroplane carrying prisoners on behalf of Mexico.[122] The Court also found that the 'discretionary functions' exception was inapplicable to the negligent piloting of the aircraft.[123]

Connection of the tort to the forum State

The requirements of a territorial connection has, in fact, turned out to be the most limiting factor in the application of a torts exception. The European Convention (Art.11) is particularly explicit on this point and requires that:

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[120] 488 *F. Supp.*673. See also *Liu* v. *Republic of China*, 642 *F. Supp.* 297 at 304 (N.D. Cal. 1986)

[121] 19 *ILM* (1980), p.1418.

[122] *Olsen by Sheldon* v. *Government of Mexico*, 729 *F. 2d* 641 (9th Cir. 1984), Cert. Denied 105 *S. Ct.*295 (1984).

[123] For a positive ruling on the "discretionary function" rule see *Matter of Sedco*, 543 *F. Supp.* 561 (S.D. Tex. 1982) (accident in connection with exploration of natural resources.)

> the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and ... the author of the injury or damage was present in that territory at the time when those facts occurred.

Section 5 of British SIA simply refers to "an act or omission in the United Kingdom". Curiously, the FSIA is somewhat vague on this point as it only refers to the resulting damage as "occurring in the United States". However, the House Report emphasizes that the tortious act or omission must occur within the jurisdiction of the United States.[124] This makes it clear that the torts exception to sovereign immunity will not be available against torts committed abroad, but also to transboundary torts like letter-bombs, transfrontier pollution and most probably, also illegal acts committed by way of international channels of communication such as telephone lines or computer links.[125]

The US courts have consistently held that jurisdiction will only be assumed over torts which have taken place on US territory. Therefore, claims arising from accidents and other torts occurring on foreign territory on the high seas or in foreign territorial waters could not be pursued under the FSIA.[126] Cases arising from murder, torture and other human rights violations occurring in the defendant States

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[124] 15 *ILM* (1976), p. 1398 at 1409.

[125] This was also pointed out in the work of the ILC: See Report of the ILC on the work of its 36th session, 1984, A/39/10, *YBILC* (1984, II,2) p.67, para 7

[126] *Matter of Sedco, supra n.*123, *Tucker* v. *Whitakor Travel Ltd.*, 620 *F. Supp.* 578; *Perez* v. *The Bahamas*, 652 *F. 2d* 186 (D.C. in 1981)

had all to be dismissed.[127] This also applied to claims by former hostages in the US Embassy in Teheran since the embassy grounds remained part of the territory of the receiving State.[128] Conversely an accident at a foreign embassy in the United States was regarded as having occurred in the US and was therefore not covered by immunity.[129] Jurisdiction was also accepted for an aeroplane crash three quarters of a mile inside the United States where the Mexican Government plane had entered US airspace merely in order to approach a Mexican airport from the height angle.[130] One District Court even went so far as to deny immunity in a case in which the president of the Central Bank of Nicaragua happened to be in Washington when signing an order to suspend all payments in foreign currency.[131]

Execution

The FSIA sets up a general rule of immunity from execution which is then qualified by number of exceptions.[132] Where these exceptions apply, property used for a commercial activity in the

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[127] *Berkovitz* v. *Islamic Republic of Iran*, 735 *F. 2d* 329 (9th cir. 1984); *Kline* v. *Republic of El Salvador* 603 *F. Supp.* 1313 (D.D.C. 1985); *Frolova* v. *USSR*, 761 *F. 2d* 370 (7th Cir. 1984).

[128] *McKeel* v. *Islamic Republic of Iran*, 722 *F. 2d* 582 (9th Cir. 1983); *Ledgerwood* v. *State of Iran*, 617 *F. Supp.* 311 (D.D.C. 1985)

[129] *Olron* v. *Republic of Singapore*, 636 *F. Supp.* 885 (D.D.C. 1986)

[130] *Olsen by Sheldon, op cit. supra n.*122.

[131] *De Sanchez* v. *Central Bank of Nicaragua*, 63 *ILR* (1982), p.584. This reasoning was not upheld by the Court of Appeals: 770 *F. 2d* 1385 (5th Cir. 1985)

[132] Sections 1609, 1610.

United States is subject to execution. Apart from waiver[133], execution is possible against property taken in violation of international law, property acquired by succession or gift, immovable property in the United States and claims arising from a liability or casualty insurance. Most importantly, execution is also possible against property which is or was used for the commercial activity upon which the claim is based. This link between the underlying claim and the object of enforcement is obviously not a requirement of international law but a deliberate compromise between granting some relief to creditors of foreign States and preserving the attractiveness of the United States for investment, by not exposing all commercial assets of foreign States to enforcement.

One question which remains completely open is the nature and degree of the connection required between the commercial activity and the property which is open to execution. It remains to be seen whether this will be taken to mean that this link has to apply to the very transaction underlying the claim; to a series of connected business contacts; or merely to the general area of

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[133] See *Hercaire International Inc.* v. *Argentina*, 642 *F. Supp.* 126(S.D. Fla. 1986), where the Court comes to the conclusion that an explicit waiver of immunity from jurisdiction amounts to an implicit waiver of immunity from execution unless that immunity is expressly retained.

economic activity of the defendant State.[134]

Another peculiar consequence of this linkage of the object of enforcement to a particular commercial activity is that the FSIA does not normally provide for enforcement of judgments arising from other exceptions to immunity from jurisdiction, notably torts. A tort victim who has successfully sued a foreign State under the appropriate provision of the FSIA will find that the Act does not provide for enforcement of his judgment[135] unless it is covered by an insurance claim.[136]

It should also be pointed out that under the FSIA all exceptions to immunity from execution refer only to commercial property. Therefore, even the waiver or the immovable property exceptions must be seen subject to this added qualification. By contrast, the British SIA provides for waiver and commercial property as alternative exceptions to immunity from execution. In other words, under the British Act waiver can also refer to non-commercial property whereas under the US Act waiver is only possible with respect to commercial property.

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[134] For a detailed analysis of this problem see Del Bianco, "Execution and Attachment under the Foreign Sovereign Immunities Act, 1976", 5 *Yale Studies in World Public Order* (1978), p.109.

[135] In *Letelier* v. *Republic of Chile*, 784 *F. 2d* 790 (2d Cir. 1984) an unsuccessful attempt was made to enforce the judgment arising from a political assassination in *Letelier* v. *The Republic of Chile*, 488 *F. Supp.*(DDC 1980).

[136] See Section 1610(a)(5).

C. CODIFICATION IN OTHER COUNTRIES

(a) Canadian State Immunity Act, (CSIA) 1982

The general scheme of the Canadian SIA is similar to both the US Foreign sovereign Immunities Act (FSIA) and British State Immunity Act (BSIA). The Act first grants immunity from jurisdiction to all "foreign states" and then carves out numerous exceptions. Section 5 of the Act provides that a State is not immune from jurisdiction in proceedings that relate to any commercial activity of the foreign State. Commercial activity is defined as, "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character". It seems, the Canadian legislators have sought to follow the practical value of the open-ended, FSIA inspired "commercial activity " definition.[137] The Canadian Act, like many other national legislations, rejects the 'purpose' test and looks instead to the "nature" of the individual undertakings.

Other exceptions to immunity are provided in Section 6 to 8 of the Act. Section 6 precludes immunity from jurisdiction in any proceeding relating to death, personal injury, or damage to or loss of property occurring in Canada. The maritime provisions of Section 7 eliminates immunity in any proceedings relating to *action in rem*

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[137] See B.D. Coad, "Canadian State Immunity Act", 11 *Law and Policy in International Business* (1982) pp.1198-1220; H.L.Molot & M.L. Jewitt, "The State Immunity Act of Canada" 20 *Can. Y.B. Int.* L. (1982), 79.

against a state-owned ship or its cargo. It also eliminates immunity from actions *in personam* for enforcing a claim in connection with the ship or its cargo - if it was in use in a commercial activity at the time the claim arose or the proceeding began. Section 8 provides that foreign States are not immune from jurisdiction in proceedings relating to the foreign State's interest in property arising through succession, gift or *bona vacantia*.

In deference to principles of international law, the Act limits the remedies available to a claimant against a foreign State. It prohibits the granting of an injuction, specific performance, or the recovery of land or other property against a foreign State, in the absence of that State's written consent.[138]

However, the Act treats agencies of a foreign state with less deference. For example, the Act does not provide immunity for property of a foreign central bank. Section 11 provides that, if money held by a foreign bank is used or intended for use in a commercial activity, it is not immune from attachment and execution. This is a significant departure from the FSIA and British SIA, which do not establish a commercial activity exception for central banks.

Finally, unlike the FSIA, the Canadian Act grants to the Executive, the discretionary authority to deny immunity. The Governor

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[138] Section 10.

in Council, with recommendation of the Secretary of State, may "restrict any immunity or privileges" granted under the Act if he determines that Canada is not entitled to reciprocal immunity in the foreign State.[139] In this respect, the Canadian Act follows the British SIA, which goes even one step further by authorising the Executive to extend immunity "to such extent as appears to His Majesty to be appropriate."

It is submitted that by selectively combining many of the more restrictive provisions of the FSIA and British SIA, the Canadian Act presents the broadest view of restrictive immunity yet codified by a Western State.

(b) South African Foreign State Immunities Act, 1981

South African courts have always applied the principle of absolute immunity. The position remained unchanged at least until the 1980 decisions in *Inter Science Research and Development Services (Pty) Ltd.* v. *Republica Popular de Mocambique*[140] and *Kaffraria Property Co. (Pty) Ltd.* v. *Government of the Republic of Zambia.*[141] After discussions of the English case laws, which included the *Trendtex* decision, it was decided in the above mentioned cases to

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[139] Section 14.

[140] 1980 2 *SA* 111. For a discussion see John Dugard, "International Law in South Africa: the Restrictive Approach to Sovereign Immunity Approved", *SALJ* (1980), p.357.

[141] 1980 (2) *SA* 709 (E).

apply the restrictive doctrine of immunity. It was also held that there was no further justification for distinguishing between claims *in rem* and claims *in personam*.

Following these decisions, the government decided to draft new legislation for the following reasons: (i) to provide more specific guidelines, (ii) to inform South African Companies as well as foreign States about South Africa's exact legal position; and (iii) to deal with procedural aspects more expeditiously.[142] Save for some minor details, the South African Act is, for all practical purposes, a copy of its British counterpart and hence needs no elaboration.

Section 16 of the Act provides that the State President has the power on the basis of reciprocity or international agreement to extend or restrict the immunity and privileges of a foreign state by proclamation in the Gazette.

Australia and Pakistan also undertook such codification exercise, on the lines of the British SIA. The structure of these two legislation are strikingly similar to their British counterpart. Interestingly, while both India and Pakistan inherited the same Civil Procedure Code in 1947, Pakistan chose to enact the State Immunity Ordinance[143] to

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[142] Gerard Erasmus, "Proceedings Against Foreign States: the South African Foreign State Immunities Act", 8 *South African Yearbook of International Law* (1982), pp. 92-105. Also see, W. Bray and M. Benkes, "Recent Trends in the Development of State Immunity in South African Law", 7 *South African Yearbook of International Law* (1981), pp. 13-39.

[143] State Immunity Ordinance, 1981 reproduced in Materials on Jurisdictional Immunities of States and their property, United nations Legislative Services, ST/LEG/SER.B/20 at p. 20.

align the national laws in tune with the evolving trend of restrictive immunity in international law, whereas the Indian law continued to remain static.

III. DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: THE WORK OF THE INTERNATIONAL LAW COMMISSION.

The International law Commission (ILC) - a body constituted by the General Assembly of the United Nations for the progressive development and codification of international law, had included the topic "Jurisdictional immunities of States and their property" in the Commission's programme of work at its thirtieth session in 1978. At its forty-third session in 1991, the ILC adopted the final text of a set of 22 draft articles on the jurisdictional immunities of States and their property.[144] The Commission also recommended to the General Assembly that it should convene an international conference of plenipotentiaries to examine the draft articles so as to conclude a convention on the subject.

Any discussion on the salient features of the ILC's work should proceed on the following two understandings:

1. The ILC, while acknowledging that the law of State jurisdictional immunity was in a state of flux and also

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[144] See the *YBILC* 1991 (Vol.II,2) pp.12-61.

recognising the futility of prescribing a doctrinal solution on the basis of *jure imperii – jure gestionis* distinction, had attempted to arrive at a consensus as to what kind of activities should enjoy immunity and the enumeration of exceptions to the general principle. This spirit of consensus is reflected in many provisions of the ILC's draft.

2. While conscious of the fact that question of deciding the granting of immunity is a matter for the domestic courts to act upon; and also that the State practice on the subject is varied in the light of the differences in political, socio-cultural and legal systems of countries, the ILC has produced a set of draft articles laying down the general principles of immunity and the exceptions thereto. The detailed procedures regarding service of process and related issues have been relegated to the realm of private international law and the procedural codes of the domestic courts.

(i) State immunity : general principle

In laying down the general rule, the draft articles adhere to the basic approach followed by national legislative codifications: proclaiming a rule of immunity and then list the exceptions, so that the onus of proof falls on the private litigant. Art. 5 of the ILC draft provides thus:

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State, subject to the provisions of the present articles.[145]

The formulation of this article proved difficult as the ILC Members were not able to agree upon the exact nature and basis of immunity. Though it was agreed that for acts performed, in the exercise of 'sovereign authority of the State' (*prerogatives de la puissance publique)*, immunity existed, beyond this hard core area there was no immunity. Some members were of the view that immunity constitutes an exception to the principle of territorial sovereignty and should be substantiated in each case. Others referred to state immunity as a general rule of international law. Hence, it was argued that the rule was not absolute, and like other principles of international law, was subjected to existing limitations. In the light of such conflicting views, the ILC side-stepped the doctrinal issue by resorting to a compromise formula. The ILC commentary to Article 5 states thus:

Article 5 is to be understood as the statement of the principle of State immunity forming the basis of the present draft articles and does not prejudge the question of the extent to which the articles, including article 5,

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[145] Article 3 of the draft articles exempts from its purview the privileges and immunities enjoyed by States under international law in relation to the exercise of the functions of its diplomatic missions. These aspects are governed by the Vienna Convention on Diplomatic Relation of 1961 and other international conventions.

should be regarded as codifying the rules of existing international law.[146]

The phrase "subject to the provisions of the present articles" in Article 5 refers to the exceptions to the general rule of immunity. Part III of the ILC draft enumerates the exception, which is broadly reflective of the categories formulated by national legislations on the subject. The exceptions include:

(i) commercial transactions
(ii) contracts of employment
(iii) personal injuries and damage to property
(iv) ownership, possession and use of property
(v) intellectual and industrial property
(vi) participation in companies or other collective bodies
(vii) ships owned or operated by a State; and
(viii) effect of an arbitration agreement.

(ii) Agencies or instrumentalities of State

Article 1(b)(iv)[147] of the ILC draft, defines a foreign State to include agencies or instrumentalities of the State and other

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[146] See *supra* n.144, p.23

[147] Article (1)(b) "State" means:

(i) the State and its various organs of government;
(ii) constituent units of a federal State;
(iii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
(iv) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State; and
(v) representatives of the State acting in that capacity.

entities, including private entities, but only to the extent that they are entitled to perform acts in the exercise of sovereign authority of States. Thus, in the case of any entity which is entitled to perform acts in the exercise of sovereign authority as well as acts of a private nature, immunity may be invoked only in respect of acts performed in the exercise of sovereign authority.

The reference to "other entities" is intended to cover non-governmental entities, when in exceptional cases are endowed with governmental authority. Examples may be found in the practice of certain commercial banks which are entrusted by a government to deal also with import and export licensing which is exclusively within the governmental powers.

The concept of "agencies or instrumentalities of the State or other entities" could theoretically include State enterprises or other entities established by the State performing commercial transactions. However, the ILC commentary to this article states thus:

> for purposes of the present articles, such State enterprises or other entities are presumed not to be entitled to perform governmental functions, and as a rule are not entitled to invite immunity from jurisdiction of the courts of another State.

(iii) Exceptions to the general rule of immunity

Part III of the ILC Draft Articles enumerates areas of

activity to which State immunity does not apply. The distinctions have been drawn on the basis of consideration of the following factors:[148] dual personality of the State; and *acta jure imperii* and *acta jure gestionis*. The commission, however, in enumerating the categories of exceptions, decided to operate on a pragmatic basis, taking into account the situations involved and the practice of States.

(a) Commercial transactions

Article 10(1) of the draft stipulates that, if a State engages in transaction with a foreign national or juridical person and differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

Article 2 defines 'commercial transaction' with the help of the already familiar elements: sale or purchase of goods or the supply of services, loans and financial guarantees and "any other contract or transaction, whether of a commercial, industrial, trading or professional nature..." The application of this definition is problematic in the numerous borderline cases which cannot be clearly and definitely classified as 'commercial'.

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[148] See *supra n.*144, p.38

The inherent problems are best demonstrated by the fact that the definitions have circular element in that they use the word "commercial" to explain the very term.[149]

One recurring difficulty in dealing with practical problems in this regard, is the 'identification' of the relevant aspect of the case.

Identification

The task of 'identification' is a difficult task as it involves complicated patterns of facts or sequences of acts and it is decisive which parts of these complex sets of facts are selected as legally relevant. In its most obvious form the problem of identification is often referred to as whether we look only at the 'nature' of the transaction or also at its 'purpose'. As has been stated earlier, the 'purpose' test is subjective and susceptible to conflicting interpretations.[150]

Yet, it is unrealistic to try and exclude purpose altogether. Every human activity can only be described in a legally meaningful way by reference to some purpose. The question is rather how far we are prepared to look; how much of the purpose surrounding any particulat activity we are prepared to accept as "legally" relevant.

Nevertheless, the rule as developed by the courts to adopt the

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[149] See C.H. Schreuer, *supra n.*75, at p.14

[150] For elaborate discussion of 'purpose' test, see *supra* p.76.

'nature' test, though not entirely logical, has turned out to be workable in most cases. The FSIA provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by references to its purpose." The British SIA does not contain such a clause although the Bill in its earlier legislative stages did.[151]

The ILC draft articles on the subject, proposes a 'nature-cum-purpose test' in Article 2(2) which is essentially a compromise clause stipulating thus:

> reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State that purpose is relevant to determining the non-commercial character of the contract.

The ILC commentary to this article explains that the modified "nature" test was in order to provide an adequate safeguard and protection for developing countries. However, doubts have been raised by some international lawyers as to the benefit that may accrue to developing countries.[152] A rule which leaves the courts with a choice to apply either one of two opposing principles is not going to be very helpful. Contracts designed to further the economic development of Third World

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[151] Sec. 3 of the State Immunity Bill of (H.L.) of 4 April 1978 contained the words "irrespective of the purposes....."

[152] See C.H. Schreuer, *supra n.*75, at p.17; and M.N. Shaw, '*International Law*' 3rd ed., (Cambridge University Press,1991) 1994 Reprint, p.442.

countries cannot be promoted by a treaty providing for their unenforceability.

(b) Personal injuries and damage to property

Nearly all the recent codifications provide for the withdrawal of immunity for illegal acts of foreign States which cause death or personal injury or damage / loss of property.

The European Convention describes this situation as "injury to the person or damage to tangible property".[153] The SIA speaks of "death or personal injury; or damage to or loss of tangible property".[154] It must be noted that Section 6 of the Canadian Act, Sec. 6 of the South African Act and Sec.7 of the Singapore Act are almost identical.

The ILC Draft, in Article 12, stipulates that a State cannot invoke immunity in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act of or omission which is alleged to be attributable to the State, if:

(i) the act or omission occurred in whole or in part in the territory of that State; and

(ii) if the author of the act or omission was present in that territory at the time of the act of omission.

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[153] Article 11.

[154] Section 5 of British SIA.

Article 12 does not cover cases not involving physical damage. Damage to reputation or defamation is not personal injury in the physical sense, nor is interference with conduct rights or any rights, including economic or social rights, damage to tangible property.

The basis for the assumption and exercise of jurisdiction is territoriality. Thus, this exception is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. Since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. A court foreign to the scene of the delict might be considered as a *forum non conveniens*.

The second condition is stipulated to render an even closer nexus between the act and actor to the place of act of commission. This clause has been inserted to exclude cases involving trans-boundary injuries or trans-frontier torts or damage, such as export of explosives, fireworks or dangerous substance which could explode or cause damage through negligence, inadvertence or accident.[155] The existence of the two cumulative conditions is needed for the application of this exception.

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[155] See *supra n.*144, p.45.

(c) Consent to submit to jurisdiction (Waiver)

State immunity applies on the understanding that the State against which jurisdiction is to be exercised does not consent to jurisdiction. This willingness or absence of consent is generally assumed, unless the contrary is indicated.

The implication of consent as a legal theory, in the rationalization of the doctrine of State immunity, refers to the consent of the State not to exercise its normal jurisdiction against another State or to waive its otherwise valid jurisdiction over another State without the latter's consent. The notion of consent, therefore, comes into play in more ways than one:

(i) in the first instance to the State consenting to waive its jurisdiction; and

(ii) to the instance under consideration (exceptions to the general rule of immunity), in which the existence of consent to the exercise of jurisdiction by another State precludes the application of the rule of State immunity.

Article 7 of the ILC draft provides that a State cannot invoke immunity from jurisdiction before a court of another State, if it has expressly consented to the exercise of jurisdiction by the court with regard to a case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

Yet, the rules regarding the expression of consent by the State involved in a legislation are not absolutely binding on the court of another State, and the court may refuse to recognise the validity of consent given by the other State, subject, of course, by any rules deriving from the internal law of the forum State. The proposition formulated in Article 7 is, therefore, discretionary and not mandatory, as far as the court is concerned. The court may refuse to recognise the validity of consent given in advance and not at the time of the proceeding, not before the competent authority, or not given in *facie curiae.*[156]

Consent to the exercise of jurisdiction covers the exercise of jurisdiction by appellate courts and including the decision of the court of final instance, retrial and review, but not execution of judgment.

The ILC commentary to this article states that, consent should not be taken for granted, nor readily implied. Any theory of 'implied consent' as a possible exception to the general principles of State immunities outlined in this draft articles should not be seen as an

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[156] See for example, *Duff Development Co. Ltd.* v. *Govt. of Kelantan* (1924) *A.C.* 797, whereby assenting to the arbitration clause in a deed, or by applying to the courts to set aside award of the arbitration, the Govt. of Kelantan did not submit to the jurisdiction of the High Court in respect of a later proceeding by the company to enforce the award.

exception in itself, but rather as an added explanation for an otherwise generally recognised exception.[157]

However, article 8 provides that consent can be evidenced by positive conduct of the State, as illustrated by entry of appearance by or on behalf of the State contesting the case on the merits. Such conduct may be in the form of a State requesting to be joined as a party to the litigation, irrespective of the degree or its preparedness or willingness to be bound by a decision or the extent of its prior acceptance of subsequent enforcement measures. For purposes of this draft article the following instances shall not be considered as amounting to consent by the State:

(i) intervention or participation by a State in any proceeding for sole purpose of invoking immunity;
(ii) intervention for sole purpose of asserting a right or interest in property at issue in the proceeding;
(iii) appearance of a State representative as a witness in a court; and
(iv) failure by State to enter appearance in a proceeding before a court of another State.

(d) Ships owned or operated by a State

Draft article 16 is concerned with a very important area of maritime law as it relates to the conduct of external trade. The difficulties inherent in the formulation of rules in this area are manifold.

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[157] *supra n.*144,p.27

For example, the English language presupposes the employment of terms under usage in common law but are unknown to and have no equivalents in other legal systems. Thus, the expressions 'suits in admiralty', 'libel *in rem*', 'maritime lien', and 'proceedings *in rem* against the ship' may have little or no meaning in the context of non-common law systems. To obviate such difficulties, article 16 uses phrases intended for a more general application.

Firstly, Art.16(1) stipulates that a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State, in a proceeding which relates to the operation of that ship, if at the time cause of action arose, the ship was used for other than governmental non-commercial purposes.[158] "Proceeding which relates to the operation of the ship", here means, any proceeding involving the determination of a claim in respect of:

(a) collision or other accidents of navigations;
(b) assistance, salvage and general average;
(c) repairs, supplies or other contracts relating to the ship;
(d) consequences of the pollution of the marine environment.

This exception does not apply to warships and naval auxiliaries or other ships owned or operated by a State and used exclusively on

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[158] The present formulation of "other than government non-commercial purposes" eliminates the problem of dual criterion introduced by the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned vessels (Brussels, 1926). The main purpose of the 1926 Brussels Convention was to reclassify seagoing vessels according to the nature of their operation (exploitation) or their use, whether in "governmental and non-commercial" or in "commercial" service.

government non-commercial service.

Secondly, article 16 (4) denies the grant of immunity to a State, in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if , at the time the cause of action arose, the ship was used for other than government non-commercial purposes. This does not, however, apply to any cargo owned by a State and used or intended for use conclusively for government non-commercial purposes.

When a question arises, in a proceeding, as to the government and non-commercial character of a ship or a cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State shall serve as evidence.

(iv) State Immunity from Measures of Constraint (Enforcement)

Part IV of the draft is concerned with State immunity from measures of constraint upon the use of property, such as attachment, arrest and execution. Article 18 stipulates that no measure of constraint, such as attachment, arrest and execution against property of a State may be undertaken without the consent of the State. Such consent may be expressed in the following ways: by a declaration before the court or by a written communication after dispute between the parties has arisen.

Measures of constraint are admissible also when:

(a) the State has allocated or earmarked property for the satisfaction of the claim which is the object of the proceedings; or

(b) the property is specifically in use or intended for use by the State for other than government non-commercial purposes[159], and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding.

Two comments are warranted as to the above mentioned aspects. First, it is submitted that the question whether particular property has been allocated for the satisfaction of a claim as provided in (a), is quite an ambiguous criteria which the courts may find difficult in administering. Secondly, in (b) it is felt that the formulation is open to mischief as States could abuse the provision by changing the status of their property in order to avoid attachment or execution.

The commentary to this article states that consent / waiver by the State under article 7 shall not imply any consent for purposes of execution. A separate waiver / consent is mandatory under article 18 for taking measures of constraint.

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[159] Article 19 enumerates the categories of property specifically in use by the State for other than government non-commercial purposes, to include:

(a) property, including bank account, which is used for purposes of diplomatic missions;
(b) property of a military character or used for military purpose;
(c) property of the central bank or other monetary authority of the State;
(d) property forming part of the cultural heritage of the State ....., and not placed on sale; and
(e) property forming part of an exhibition of objects of scientific, cultural or historic interest interest and not placed on sale.

(v) Miscellaneous Provisions

Part V of the draft articles provide that, the service of process by writ or other document instituting a proceeding against a State shall be effected in accordance with any applicable international convention, to which both States are parties. In the absence of such a convention, the service of process shall be transmitted through diplomatic channels to the Ministry of Foreign Affairs of the State concerned.[160]

Article 22 on "Privileges and immunities during court proceedings", recognises that a State may, sometimes for reasons of security or their own domestic law, be prevented from submitting certain documents or disclosing certain information to a court of another State. Hence, this article forbids the imposition of any fine or penalty on a State for such refusal or failure to disclose information or documents.

Consideration of the ILC Draft Articles by the General Assembly of the United Nations

With the adoption of the draft articles, the International Law Commission had, in 1991, recommended the General Assembly to convene an international conference of plenipotentiaries to conclude a convention on the subject, based on the ILC's work. The General Assembly at its fifty-second session in December 1997, has decided to

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[160] Article 20.

consider this item at its forthcoming session (fifty-third session in 1998) "with a view to the establishment of a working group at its fifty-fourth session.[161]

This move towards constituting a Working Group, it is hoped, is a step towards the finalisation of an international convention on the vexed and untenacious subject of jurisdictional immunities of States and their property.

The foregoing study of codification of law relating to sovereign immunity reveals that this topic has received greatest importance in the academic and political organs relating to international law, such as International Law Association, Harvard Research Centre and International Law Commission, besides the League of Nations itself. As the international codification process was concurrent to the major codification efforts undertaken in the municipal level in USA and UK, the codification in the national and international sphere, seemingly had a symbiotic relationship. Similar relationship can be seen in the interface between European Convention on State Immunities and the British SIA on the one hand, and the British SIA and FSIA, on the other, as has been discussed in the preceding passages.

The early codification process, resulting in the Brussels Convention of 1926, was allowed to play a distinct role under the

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[161] See *UNGA Res.*52/151 of 1997.

codified regimes as the subject-matters covered under this Convention had not been deliberately covered either in the European Convention or in FSIA or SIA.

The comparative study attempted in the preceding pages reveal that the codification process whenever it has taken place in the municipal realm has oriented the legislation towards restrictive immunity by opening a statement of law concerning general rule of immunity, and later enumerating exceptions to the general rule.

The judicial interpretation of the doctrine of sovereign immunity involving ambiguous reference points like "nature" "purpose" and "object" test; "*writ in rem* and *writ in personam*;" have been restated by adopting clearer language. The greatest advantage of codification is that it deals with diverse situations such as commercial transactions; contracts of employment; personal injuries and damage to property; ownership, possession and use of property; intellectual and industrial property; participation in companies or other collective bodies; ships owned or operated by States; and effects of arbitral agreements. The enormous time taken by judiciary through common law to develop the law relating to sovereign immunity on a case-by-case basis, would tell us, how efficacious the legislation–based approach would be to develop law in a manner more suitable to satisfy various interests of individual business transactions and at the same time ensure more uniformity and predictability in its applications. Yet another area, which

was otherwise nebulous, has been stated with clarity is the notion of waiver.

However, the power of the executive to certify or suggest to the effect that one of the parties in the litigation is a sovereign has largely been curtailed. Yet, the executive under FSIA, to a limited extent retains the power to exercise this right in certain exigencies.

Thus it is submitted that the treatment of the subject of sovereign immunity, which has traditionally been mired in the absolute-restrictive theory controversy, can currently be safely asserted to have found its balance in the pragmatic and functional approach adopted by recent codifications on the subject. The uncertainty that existed when both courts and the foreign office were involved in the determination of sovereign immunity, on account of expediency of foreign policy, has to a great extent been eliminated. Now, this has been replaced by a more rule-oriented regime as fashioned by national legislations.

The codification efforts at the national level in the United Kingdom and United States reveal that the historic and specific cultural and legal conditions in which they have evolved may have resulted in marginal variations of certain provisions. Still, they have undoubtedly been successful in infusing the element of certainty for the protection of the private individual's interests, while at the same time are adequately broad-based to protect the State's interests from frivolous and vexatious suits. If one takes a broad look at the developments

portrayed in the foregoing discussions one might ask what impact all this has had on the international law governing sovereign immunity. From a general perspective, it can be said that the doctrine of restrictive immunity has been strengthened to a point where practically materials drawn from all countries had been consolidated into a single draft. This new standard which the International Law Commission had beneficially put to use in its codification exercise constitutes a progressive development of international law in this field.

By and large, there is a consensus among international lawyers that the ILC has done an appreciable task in flushing out the bare minimum for a future international convention on this topic.

It may be mentioned here that while the national legislations on sovereign immunity have achieved much needed differentiation and clarity in details, they have also brought new problems. Legal principles have tended to get nationalised and increasingly localised without any uniform practice. Application has become a matter of statutory construction and not of interpretation of international law. But, the encouraging trend, now discernible, is that the sovereign immunity no longer finds a place in the executive realm, it rather is now decided on the application of statutory rules.

No doubt, many changes have occurred since the conclusion of ILC's the work on this field. The process of globalisation and efforts

towards rapid privatisation could act as a catalyst for States to reconsider the 'nature and purpose test' of a commercial transaction and review the provisions relating to 'State trading enterprises'.

The conclusion of an international convention on the lines of ILC draft model has become a necessity not merely for any aesthetic considerations of homogenity, but more for the reasons of assimilating State practice within a framework that matches the economic and commercial realities of the times. States which do not have legislation in this area must learn from the experience of similarly situated States. They cannot afford to wait for an international convention as nobody is sure about the outcome of the ILC process. They must start their national codification process forthwith.

PART III

SOVEREIGN IMMUNITY

IN

INDIA

CHAPTER V

SOVEREIGN IMMUNITY IN INDIA IN PRE-CONSTITUTIONAL ERA

The concept of sovereign immunity as conceived by courts in common law countries differs from the perception of their counterparts in continental countries. The courts in common law countries, especially the English court were presented with unique and novel problem of handling cases of sovereign immunity concerning the Princes and Rulers of native Indian States. The determination of the jural status of the native Princes and Rulers vis-à-vis the Paramount power gave rise to intricate problems to the courts in Britain and to the British Indian courts. This problem had further been aggravated by the possible political implication of the decision as to whether a Prince or Chief was a sovereign or not.

However, the scene in its entirety has changed - not all of a sudden, but through an evolutionary process - since India became independent and became Republic. Though, the jural relations between erstwhile princes and Rulers vis-à-vis the ordinary citizens of India have undergone a transformation, the vestiges of the colonial era remained even after the Indian Constitution came into force. The former had dual status, one for the purpose of transactions entered into by them with others in pre-constitutional era as a holder of special

privileges under law, in the capacity of native Rulers and Princes. The other, as ordinary citizens after the abolition of Privy Purses. This gave rise to a special problem to the post independent judiciary in resolving the compatibility of the dual status of the past rulers with the rights of other citizens.

The sovereign immunity in India had originally been dealt with under the common law and Civil Procedure Code of British India. The Code was later subjected to modifications in the year 1951 and finally in 1976 and 1977. The subject has also been dealt with colaterally under certain specific provisions of the Constitution of India and Criminal Procedure Code.

As chronology plays a very important role in the evolutionary process of the sovereign immunity in India - the immunity available to former Rulers and Princes on the one hand, and the Princely States on the other requires a chronological study in two phases: in the pre-constitutional era and post-constitutional era.

International Personality of Rulers of native Indian States

The history of sovereign immunity in India has to be traced with reference to the Rulers of erstwhile native States as they enjoyed to a limited extent, a semblance of privileges as those of the Heads of sovereign independent States recognised as members of the family of nations in international law. It all began with the British Crown taking over, from East India Company, the administration of the entire territory

of India in 1858. Under the direct rule of the Crown, though, the Indian States remained under the personal rule of their Chiefs, yet were under the suzerainty of the Crown. In other words they all remained under the *paramountcy* of the Crown.

The unique relationship between the paramount power and the Indian States was described in the *White Paper on Indian States* thus:

> The paramountcy of the British crown was not coextensive with the right of the Crown flowing from treaties. It was based on Treaties, Engagements, *Sanads* as supplemented by usage and sufferance, and by decisions of the Government of India and Secretary of State embodied in political practice.[1]

The said White Paper further stated that, while the States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence. The Indian States had no international status and for external purposes, they were practically in the same position as British India.

While their relations with the Crown were governed by treaties, though initially on terms of equality, as the time went by and the British Crown in India became paramount, the relationship between it and the Rulers was down graded when the interests of the British Empire and those of the subjects of the native States so required. For example, when the Nizam claimed equality with the British Crown, the then

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[1] *White Paper on Indian States*, at p.22. Printed in India by the Manager Govt. of India Press, New Delhi, July 1948.

Viceroy Lord Reading informed him on 27th March,1926 thus:

> The sovereignty of the British Crown is supreme in India and therefore no ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing.

After giving a few illustrations to negative the claim of Nizam, the Viceroy proceeded to observe:

> other illustrations could be added no less inconsistent than the foregoing with the suggestion that the Government of your exhalted Highness and the British Government stand on a plane of equality.[2]

This paramountcy was described by Shah, J., as "brazen faced autocracy" in *H.H. Maharajadhiraj Madhav Rao Jivaji Rao Scindia Bahadur etc.* v. *Union of India*.[3]

It follows thus, that the status of native States as international personalities was denied. The notification of Government of India which was a resolution containing a proclamation regarding the trial of accused persons in Manipur and the regrant of the Manipur State also confirms this view in the following manner:

> The principles of international law have no bearing upon the relation between the Government of India as representing the Queen Empress on the one hand, and the native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter. In the exercise of their high prerogative, the Government of India have, in Manipur as in other protected States, the unquestioned right to remove by administrative order any

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[2] Vide Appendix I of the *White Paper on Indian States. ibid* p.150

[3] *AIR* 1971 S.C. 530.

person whose presence in the State may be seen objectionable. They also have the right to summon Darbar through their political representative for the purpose of declaring their decision upon matters connected with the expulsion of the ex-Maharaja through their Officers.[4]

Judiciary also upheld this view that, for the purposes of international law, Indian States could not be treated as international persons.[5] Publicists like Hall,[6] Westlake[7] and Smith[8] have also expressed the view that Indian States were not subjects of international law. Oppenheim[9] was of the opinion that Indian States were all vassal States, and not protectorates.

The Supreme Court in its majority view in *H.H.Maharajadhiraj Madhav Rao Jivaji Rao Scindia, etc. v. Union of India* subscribed to the idea that these States had no international personality.[10] Nonetheless, status of the rulers of these States, was recognised in England as being on par with other Rulers in the matter of personal immunity from being sued in their courts. As the courts in British India, from the earliest time had administered and applied the English common law

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[4] *Gazette of India,* Part I, dt.21st August, 1891, p. 488.

[5] *Rani Amrit Kunwar* v. *Commissioner of Income Tax, Central & United Province Lucknow*, *A.I.R.* 1946, All. 306, Full Bench.

[6] Hall, *A Treatise on International law,*(Seventh edition, Stevens & Sons Ltd., 1917), at p.8.

[7] Westlake, *Collected Papers of International Law*, p. 216.

[8] Smith, *International Law,* p. 59.

[9] Oppenheim, *International Law, A Treatise,* vol. I, Ed. by H. Lauterpacht (ELBS & Longmans, 1966),p.190

[10] *supra n.*3.

and rules of international law with regard to immunity of foreign sovereign and foreign States, no wonder that they subscribed to the view, in a long line of cases[11], that Ruling Chiefs of Indian States were sovereign Princes and were not amenable to Civil jurisdiction of courts in British India.

It may be mentioned here that the native Chiefs were considered by the courts as not subject to the laws of British India and exempted from their jurisdiction on the basis of the general principles of law, irrespective of any reference to the Civil Procedure Code. The Court in this connection observed thus:

> We observe that although the Section of Civil Procedure Code relating to the jurisdiction of the civil courts contains no provisions specially exempting Indian native Chiefs from the jurisdiction of our civil courts, it might reasonably be inferred on general grounds, that the Act in question was applicable only to those persons who are generally subject to the laws of the British Government and that therefore no special enactment would be deemed necessary for the exemption from the jurisdiction of our courts of those persons who were generally not subject to the laws British Government.[12]

On the same reasoning, in another case, the Court held that an agent employed by an Indian Prince for the purpose of trading in

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[11] *Jawala Prasad* v. *Rana of Dholpur*, 1863, ISDA Decision for NWP, p.579; *Sardar Gurdayal Singh* v. *Raja of Faridkot*, 1894, *A.C.* 670; *Moustak Rai* v. *Lady Randheer Singh of Kapurthala State*, (1870)54 *P.R.* 1870, p.139; *Lachmi Narain* v. *Raja Pratab Singh of Rampur*, (1878-80) 2 *All* I; *Ladkuwer Bai* v. *Gohel Shri Sarangji Pratabsangji*, (1870) Bom *HCOC* 150 at p.154; *Beer Chunder* v. *Nobodeep*, (1883) 9 *Cal* 535; *Phuman Lal* v. *Raja Shamsher Prakash* (1875) *Pun Re* 93.

[12] The Court in 1863 ISDA decision for NWP, at p.579.

British India could not sue the Prince to recover arrears of his salary.[13]

How the Rulers of Indian States had been treated by the judiciary in matters relating to taxation is another important point which would indicate how "sovereign" were the Rulers of Indian States. The decided cases on this point fall short of consistency as the courts dealt with the Income-Tax matters differently than Trading Tax and Agricultural Income Tax.

In an early case relating to taxation of timber trade carried on by Tehri state, exemption of Rulers of Indian States from taxation under the Income Tax Act was upheld.[14]

The Federal Court, although sometimes agreed, that the Rulers of Indian States did not possess "any vestige of international personality" still relied upon *Duff Development Co. Ltd.* v. *Government of Kelantan* [15] and *Statham* v. *Statham & Gaekwar of Baroda,*[16] in order to hold that since the Ruler of any particular Indian State (like any foreign Ruler) enjoyed immunity from being sued in British Indian courts, the British Indian Legislature would not pass any legislation which courts in British India would have no power to enforce.[17]

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[13] *Ladkuwer Bai* v. *Gohel Shri Sarangji Pratabsangi,* (1870)7 Bom *HCOC* 150, at p.154.

[14] *Matter of Ram Prasad, AIR* 1930, All. 389; Reference made by Commissioner of Income Tax, U.P.

[15] 1924 *A.C.* 797.

[16] 1912 *LRP* 92.

[17] *supra n.*5.

Therefore, the Income Tax Act did not apply to Ruler of an Indian State. He was not liable to pay tax for income and he could not be treated as assessee, for any purpose under the Income Tax Act.[18]

Section 4(3) of the Indian Income Tax Act was amended by Indian Income Tax (Amendment) Act (23 of 1941) to reflect this line of thinking. This amendment made it clear that an accredited representative in British India for political purpose of a Ruling Chief was not liable to pay income-tax on any remuneration received by him in such capacity. That sub-section recognised, in part the rule of public international law that an ambassador of foreign State was not liable to pay tax in the country where he might be posted by his Government. Further, under Sec. 49A of the Act, which was added by the Indian Income Tax Act (VII of 1939) the Central Government was authorised to, make provision by notification in the Official Gazette, for granting of relief in respect of income in which both income tax under that Act and Dominion tax had been paid.

The foregoing judicial opinion and legislative intent suggest that the British Indian legislature recognised that the territory of Indian native State was outside British India for the purpose of taxation and that the ruling Chief of an Indian State was a sovereign Prince who had same immunity from taxation as any other sovereign.

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[18] *The Accountant General, Baroda State* v. *The Commissioner of Income Tax, Bombay City*, *AIR* 1948, Bom. 409.

However, in one of the cases[19], which was later overruled by Privy Council[20] it was held, by implication, that the Ruler of an Indian State was not entitled to exemption from income tax. Since the functions like conduct of international relations, the authority to suppress gross misrule in the State, and the regulation of armaments and the strength of military forces, were all being exercised by the British Crown. Hence, the Ruler of a suzerain State, was held not entitled to claim immunity from taxation which, only an independent sovereign might claim.

However, in matters of trading taxation a different approach was adopted by the courts. Sec. 2 of Government of India Trading Taxation Act, 1926 is a case in point. This section stipulated that all trading and business operations carried on by any Government of His Majesty's Dominion, exclusive of British India, were subjected to taxation under the Income Tax Act, 1922 in the like manner of a Company, and to all other taxation like any other person. If any Indian Ruler advanced some money to any corporate body incorporated in British India, which in turn utilised it for its business in British India; the interest on loan even though payable at Ruler's State, would be liable for assessment under the

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[19] *Kunwar Bishwanath Singh* v. *Commissioner of Income Tax, Central & United province, AIR* 1942 All. 295.

[20] *AIR* 1943 PC 181.

Income Tax Act.[21] Similarly, if any native Indian State owned a Bank (even though situated within the State) which made investments in British India; the incomes arising in connection with the trade or business carried on in British India attracted the operation of Sec.2 of Government of India Trading Taxation Act, 1926 and was therefore, liable to assessment of Income Tax.[22]

Do the rulers have immunity regarding income tax arising out of agricultural operations, was yet another question posed to the Supreme Court. Contrary to its view on income tax matters, a different view was taken by the Supreme Court in this regard. In *Sudhanshu Sekhar Singh Deo* v. *State of Orissa*[23], the petitioner challenged the validity of Ordinance No.4 of 1949, whose effect was to render the Orissa Agriculture Income Tax Act, 1947 applicable to merged Orissa State. Due to this, the Ruler of Sonepur was assessed for income tax, against which plea of sovereign immunity from taxation and also violation of guarantee under Merger Agreement, was put forth. However, it was held that immunity claimed by appellant was not one of the personal rights or privileges within the meaning of Merger Agreement, and hence the appellant was liable to pay agricultural

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[21] *A.H. Wadia as agent of the Gwalior Durbar* v. *Commissioner of Income Tax, Bombay, AIR* 1949 Federal Court 18.

[22] *Patiala State Bank* v. *Commissioner of Income Tax, Bombay, AIR* 1943, Privy Council, 181.

[23] *AIR* 1961 SC 196.

income tax under the Act. This case marked a departure from the general practice of pre-independence courts which held native sovereigns as immune from personal taxation.

Later on immunity from taxation was also claimed on the basis of international practice. The court did not accept this plea; it held a view that the Indian States being under the suzerainty of British Crown were never recognised as international persons. The lapse of suzerainty or the breaking of ties with British Crown did not *ipso facto* raise their status to that of 'international persons'. It created a legal hiatus in the status of States. No *de facto* or *de jure* recognition was given to these States under international law. Hence, these Rulers could not rely upon international law for purposes of claiming immunity from taxation of their personal property.[24]

The Supreme Court was also influenced by the line of reasoning adopted by courts of other countries in similar matters. In one of the cases decided by the Supreme Court of India[25], the Court drew support of a case quoted in the Article "Immunity from taxation on foreign owned property" (AJIL XLI p. 239), where the Supreme Court of Ceylon in the *Superintendent of the Govt. Soap Factory, Banglore* v. *Commissioner of Income Tax*, held that the profits made in Ceylon by

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[24] *Commissioner of Income Tax, A.P.* v. *H.E.H. Mirosman Ali Bahadur, AIR* 1966 S.C. 1260.

[25] *Colonel H.H.Raja Sir Harinder Singh* v. *The Commissioner of Income Tax Punjab, and others. AIR* 1972 S.C. 202.

the Mysore Government Soap Factory could be taxed by the Ceylon Government without violation of international law. The Ceylon Court held that the State of Mysore had no status in international law and could not claim any immunity under international law. On this basis, Supreme Court in the instant case rejected the plea of immunity made by the Ruler of erstwhile Faridkot State.

The foregoing discussion reveals that the attitude of the British Crown and the courts in the British India was generally influenced by the English common law (relating to absolute personal immunity of the sovereign) concerning the status of the sovereign Prince and erstwhile Rulers. However, the status of Indian States were different. At no point of time these States had a recognition of being a jural entity capable of exercising sovereign rights and enjoying sovereign immunities.

A similar conclusion emerges from a case study of the treatment of former Rulers in matters of their tax liability. The predominant view available in this regard is that the Rulers of Indian States were treated at par with the Rulers of Europe in their personal capacity; to a certain extent this logic was applied to the sovereign's personal property also.

However, when a property was judicially construed as the property of the State, the tax exemption plea founded upon personal immunity was consistently rejected by the courts. The period between the 1940's and 1950's appears to be the period marking the decline of

sovereign immunity of the former Rulers of native States. The adoption of the Constitution of India and the consequential shift in the juridical status of the Rulers of Indian States, placed them in a vulnerable position of veritable holders of certain concessional privileges of doubtful validity rather than rightful depositories of legally sustainable immunities.

CHAPTER VI

STATUTORY PROVISIONS RELATING TO SOVEREIGN IMMUNITY IN INDIA

Until 1877 there existed no statutory basis for the detemination of immunity of Sovereign Princes and Ruling Chiefs from suits. The Civil Procedure Code of 1877 formed the legislative basis for the doctrine of sovereign immunity in India. The relevant provisions[1] concerning the sovereign immunity contained therein have been suitably modified subsequently in the years 1908 and 1951.

Unlike the modern statutory provisions in FSIA 1976 and SIA 1978, the CPC did not deal with all the aspects of sovereign immunity. The scope of the Code was restricted to laying down rules regarding the following aspects; when foreign state may sue, person authorised by Government to prosecute or defend Princes or Chiefs; suits against sovereign Princes; situations in which sovereign Princes are exempt from arrests; situations where their property may be attached; and execution in British India of decrees of courts of native States. These provisions appear to have been made considering the special situation prevailing during that time in India when the native Chiefs and princes had been treated less than sovereign for certain purposes and

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[1] Ss. 431-434, *Civil Procedure Code*, 1877.

sovereign for certain other purposes.

Sec. 431 of CPC, 1877 dealing with the question, when a foreign State may sue, reads as follows:

> **Sec. 431 :** A foreign State may sue in the Courts of British India, provided that-
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> (a) it has been recognised by Her Majesty or the Governor-General-in-Council, and
>
> (b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.
>
> The Courts shall take judicial notice of the fact that a foreign State has not been recognised by Her Majesty or by the Governor-General-in-Council.

The above provision dealt with two important issues: first was a precondition for a foreign State to sue in the courts of British India and the second was a direction to the court. The precondition was that the foreign State which intended to sue, should have been recognised by Her Majesty or the Governor-General-in-Council and the object of the suit must be to enforce the private rights[2] of the Head or of the subjects of the foreign State.

The last paragraph of the section which dealt with the legislative direction, made it obligatory for the court to take judicial notice of the

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[2] The meaning given to the "private rights" spoken in Sec.431(b) of the C.P.C. of 1882 had been the subject matter of discussion in *Hanjon Manick* v. *Bur Singh, ILR* II Cal. (1885)17. The Court opined, that the words "Private Rights" did not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a court of justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity. For a similar view, see *Ali Akbar Kashani* v. *United Arab Republic, AIR* 1966 S.C.230.

fact of the non recognition of a foreign State.

Sec. 432 provided for the appointments of persons, at the request of any sovereign Prince or Ruling Chief,[3] to prosecute or defend on his behalf.[4]

The legislative intent reflected in these provisions was that only the foreign State which has been recognised by Her Majesty or the Governor-General-in-council will have access to the courts of British India. That too, only when the object of the suit is for the enforcement of private rights of the Head or of the subjects of foreign State. If the court believed that foreign State has not been recognised by Her Majesty or the Governor-General-in-Council, it was not be allowed to sue.

The suits against sovereign Princes were regulated by Sec. 433 of Civil Procedure Code, 1877. According to this the Prince and any ambassador or envoy of a foreign State cannot be sued without obtaining consent from one of the Secretaries of the Central

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[3] As to persons who had been held to be sovereign Prince and Ruling Chief, many old cases can be mentioned. The following were declared to belong to this class by the Court: Desai of Patadi, The Raja of Poonch, the Raja of Faridkot, Kusunderad Jageerdar and The Maharaja of Banaras, see (1884)8 *Bom.* 415 (DB); *Pun Re* No.21, p.45; 1888 *Pun Re* No.191,p.491; *AIR* 1919 Bom. 122 and *AIR* 1924 All.422.

[4] **Sec.432:** Persons specially appointed by order of Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

Government. However, the seeker of such consent to sue must qualify any one of the conditions state below:

(i) the Prince, Chief, ambassador or envoy has instituted a suit in a Court against the person desiring to sue him;

(ii) the Prince, Chief, ambassador or envoy by himself or through another trades within the local limits of jurisdiction of such Court.

(iii) the subject matter of the suit is immovable property situated within the local limits and in the possession of the Prince, Chief, ambassador or envoy.

This section further provided immunity from arrest and attachment of property of such Prince or Chief and any ambassador or envoy of a foreign State.

The execution in British India of decrees of native courts had been dealt under Sec.434. The Governor-General-in-Council was, under this provision, empowered to notify in the Gazette of India declaring the executability of decrees of any civil and revenue courts situated in the territory of any native Prince or the State in alliance with Her Majesty. In the same way, the Governor-General-in-Council might terminate such declaration also. A decree stood executable as long as the declaration made under Sec.434 was in force.

The foregoing provisions were subjected to further modification by the Code of Civil Procedure, 1908 (Act V of 1908). Under this Code Ss. 84 to 87 dealt with this aspect. In all these sections the reference

to "Governor-General-in-Council" was substituted by "Central Government".[5] A major change had been brought in Sec.84 (corresponding to old Sec. 431) by replacing "of the subjects of the foreign State" by the phrase "any officer of the State in his public Capacity".

In Sec.85 a new addition had been made by including an explanation to the expression "the Government". According to this explanation "the Government" means "(a) in case of any Indian State, the Crown representative and (b) in any other case, the Central Government." Corresponding changes were also made in Sec. 86(I) dealing with consent procedure that in the case of suit against Ruling Chief of an Indian State consent was to be obtained from the Crown Representative, certified by the signature of the political secretary. An amendment had also been made in Sec. 86(2) (corresponding to Sec.433 CPC 1877) adding, "for money charged therein" in a clause imposing condition on possession of immovable property.

India become independent in the year 1947, yet Princely States continued until the last integration. This necessitated the protection of erstwhile Princes and Chiefs under the Constitution of

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[5] An administrator of a native State who was ruling the State as the representative of the Government of India and had been appointed by the Government of India to prosecute suits on behalf of the State, was held competent to institute suits on behalf of the State in British Indian Courts. See *Bachan Singh* v. *Dharamarth Bank, AIR* 1933 Lahore 456.

India.[6] Corresponding changes had to be brought by amending the Code of Civil Procedure. The *Statement of the Objects and Reasons of the Bill* (which later became amending Act II of the Civil Procedure Code, 1951) stated that in view of Constitutional absorption of the former Indian States in the polity of the country, it had become necessary to recast the fascile of five sections relating to suits by aliens and by or against foreign Rulers and the Rulers of Part B States. However, the Act did not intend to bring a radical change in Ss. 84-87 as these provisions had been applied till recently to all those Rulers of Indian States who exercised sovereign powers within their territories. The change in their constitutional position, it was thought, should not affect the personal privileges enjoyed by them prior to the commencement of the Constitution, as the Government was keen on implementing the assurances given to the Rulers at the time of merger or integration of their States with the Indian Union.

The Amending Act intended, however, to remove the reference such as "sovereign Prince or Ruling Chief" – a colonial connotation characteristic of earlier legislative provisions. Similarly, the reference to

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[6] See Article 372 of Constitution of India for Republic of India's status vis-à-vis erstwhile Princes and Chiefs. When the Indian States integrated with British India, the Rulers of native States and the Government of India entered into covenants and agreements. In those covenants it was agreed that the privilege, dignities and titles of the Indian Princes would continue to be recognised. When the Constitution was enacted, the assurance in the covenants was respected and Art. 362 was included in the Constitution. It made obligatory, while legislating, to give regard to the guarantee/assurance under covenants, concerning personal rights, privileges, dignities of the Ruler of Indian States.

possession of immovable property contained in old Sec. 86 of CPC had been modified to cover the tenant of an immovable property[7] to sue without consent under Sec. 86 of amended CPC. Besides this improvement, the notions of express and implied waiver also found a reference in the amended version.[8]

Sec.85 of the CPC 1951 provided that the "Ruler of a foreign State may sue and shall be sued in the name of the State". This provision appeared to be an improvement of the provision contained in earlier Act. Sec.87-A & Sec.87-B were addition to the CPC which dealt with definition of "foreign States" and "Ruler" and application of Sec. 85 and 86 to Rulers of former Indian States [9] respectively. The separate definition for "foreign State" and "Ruler" was later found susceptible to arguments pertaining to the nature of immunity conferred and person addressed in that connection[10].

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[7] See the proviso of Sec.86 of CPC as amended by Act II of 1951.

[8] See Sec. 86(2) (d).

[9] The pharse "suit against Rulers of former Indian State" had been interpreted by the Courts very narrowly that this provision was not applicable to insolvency proceedings, probate proceedings, proceedings under letter of administration, Industrial Disputes Act, Companies Act, and Arbitration Act as these proceedings were not considered to be suits. See also *Official liquidators, Dehradoon Mussoorie Electric Tramway Co. Ltd.* v. *President, Council of Regency, Nabha State, AIR* 1936 Allahabad 826 (full Bench); *Madan Lal Jhunjhunwala* v. *H.H. The Nawab Sayed Raza Ali Khan Bahadur Mustaid Jung, Ruler of Rampur State of U.P., AIR* 1940 Calcutta 244; *H.H. Vir Singh Deo* v. *Ganga Vishudas Lachmandas, Unreported Insolvency no.89* of 1951 (Bombay); *Indrajit Singhji Vijay Singhji* v. *Rajendra Singhji Vijay Singhji, AIR* 1956 Bombay 45; *H.H. Maharana Sahib Shri Bhagwat Singh Bahadur of Udaipur* v. *The State of Rajasthan, AIR* 1964 S.C.444; *Nawab Usman Ali Khan* v. *Sagarmal, AIR* 1965 S.C. 1798.

[10] See the decision in *Ali Akbar Kashani* v. *United Arab Republic, AIR* 1966 S.C. 230.

However, the new provisions Sec. 87-A and Sec.87-B appeared to be carefully thought out provision for laying rules to deal with: (a) Ruler in relation with a foreign State (b) former Indian State (c) Ruler in relation with a former Indian State, as these phrases carry different connotations.[11]

Sovereign immunity in Criminal Procedure Code

It is a matter of common knowledge that general international law confers immunity on the sovereign in matters of criminal cases. The Anglo-American system seldom deals with this matter in a statute. In contrast to this general practice, the Criminal Procedure Code of India dealt with this matter in Sec. 197-A. This provision was inserted

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[11] **Sec. 87-A :** *Definitions of "foreign State" and "Ruler"*-

(1) In this Part-

(a) "foreign State" means any State outside India which has been recognised by the Central Government; and

(b) "Ruler", in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of that State.

(2) Every Court shall take judicial notice of the fact-

(a) that a State has or has not been recognised by the Central Government;

(b) that a person has or has not been recognised by the Central Government to be the head of the State.

Sec. 87-B : *Application of Ss.85 & 86 to Rulers of former Indian States*-

(1) The provisions of Sec.85 and of sub-sec. (1) and (3) of Sec.86 shall apply in relation to the Rulers of any former Indian State as they apply in relation to the Ruler of a foreign State.

(2) In this Section-

(a) "former Indian State" means any such Indian State as the Central Government may, by notification in the Official gazette, specify for the purposes of this section; and

(b) "Ruler", in relations to a former Indian State, means the person who, for the time being, is recognised by the President as the Ruler of that State for the purposes of the Constitution.

by Act I of 1951, and it closely resembles Sec. 87-B of the CPC. According to Sub-Sec. (2) of this section "no court shall take cognizance of any offence alleged to have been committed by the Ruler of a former Indian State except with the previous sanction of the Central Government."[12] There have not been many cases decided on this matter. Even the cases decided by the High Courts indicate the courts' unwillingness to exempt the Rulers of former Indian States from criminal liability.[13] This provision helped the Rulers of former Indian States to get only exemption from personal appearance in the court.[14] The courts' hesitancy to extend the immunity in criminal matters to the Rulers of Indian States sprang from the basis that the Criminal Procedure Code provision was supported neither by the constitutional Law nor by statutory law.[15] The practice indicates that the courts of India never considered a Ruler of Indian State as a sovereign capable of claiming immunity for his criminal acts.

Consequent to the abolition of Privy Purses, Sec.197 of Criminal Procedure Code was deleted in 1973, but the observations made by the Courts in regard to the sovereignty of the Rulers of native States

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[12]This provision has been incorporated on the basis of Art. 362 of the Constitution of India to protect the Rulers of Indian States from vexatious criminal proceedings. However, this rule will not be applicable when a former Ruler of Indian State is nominated as a candidate for election under Sec. 168 of the Representation of Peoples Act, 1951.

[13] *Purshottam Vijaya & Others* v. *Dilip Singhji & Others*, *AIR* 1953 M.B. 254.

[14] *Jaswant Sinhji Fateh Sinhji* v. *Kesuba Harisinh*, *AIR* 1953 Bom. 108.

[15] See *Abdul Alim Khan* v. *Sagarmal Bheerjee*, *AIR* 1963 M.P. 162.

and the immunity they enjoy, still remain as authoritative precedents.

Constitutional validity of sovereign immunity of Rulers of native States under Sec. 87-B

The constitutional validity of Sec. 87-B had been questioned many a times before the court of law. It has been argued in this regard that this provision violates Article 14 of the Constitution which provides equality before law and equal protection of the laws to every person. The main argument levelled against Sec. 87-B Civil Procedure Code was that it was made applicable only to Rulers who had signed agreements referred to in Art. 291 (1) or those Rulers to whom Privy Purses had been guaranteed under Art.291. Since many Rulers of former Indian States neither signed agreements referred to in Art.291(1) nor had Privy Purses been guaranteed to them under Art. 291(1); they argued that Sec.87-B CPC was violative of Art. 14 as it was founded upon an unreasonable classification. The Supreme Court after taking into consideration the past history and the antecedents of these Rulers, the merger agreements and the direction of the legislature contained in Article 362, rejected the contention that there was no reasonable basis for classification under Sec. 87-B, CPC.[16]

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[16] *Mohan Lal Jain* v. *H.H. Maharaja Shri Sawai Man Singhji, AIR* 1962 S.C. 73. In *A.V.R. Athre* v. *Chief Secretary AIR* 1963 Mys. 171, the Court observed that although S.87-B looks like a special legislation, it never violated Article 14 of the Constitution.

In *Narottam Kishore Das Varman* v. *Union of India*[17] the question was raised as to whether sec.87-B, CPC was violative of Art.19(1)[18] of the Constitution. The court answering the question in negative stated:

> The events occurred with unprecedented swiftness after the 15th August, 1947 and we have to bear in mind the fact that the relevant negotiations carried on by the Central Government were inspired by the sole object of bringing under one Central government the whole of this country including the former Indian States. Considered in the context of these events, the specific provisions made by Sec. 87-B were not unreasonable and were not against the interest of general public.

Abolition of Privy Purse and the consequent amendment (26th Amendment Act, 1971) of the Constitution and the C.P.C. had created far reaching consequence in terms of the contemporary legal status of the Rulers of Indian State. The question: Does Sec.87-B of C.P.C. continue to govern the Rulers of Indian States even after the

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[17] *AIR* 1964, S.C. 1590.

[18] Art.19(1) of the constitution deals with 'freedom of speech' in the following manner:

19(1): All Citizens shall have the right-

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations of unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
...
(g) to practice any profession, or to carry on any occupation, trade or business.

(2) *nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.*

abolition of Privy Purse and privileges, surfaced again. The Rulers of Indian States (Abolition of Privilege) Act, 1972 and the consequent amendment in Criminal Procedure Code[19] had diluted further the protection enjoyed by the Rulers.

After so many changes in the status of former Rulers, S.86 was still constrained by its perception of the personal immunity of the Ruler. In the 1970[s], lot of developments were taking place in the field of sovereign immunity all over the world. The idea that immunity of the State as juristic personality was primary and personal immunity of the Ruler was secondary – by and large had been established in international law. The Supreme Court also held in *Mirza Ali Akbar Kashani* v. *UAR*[20] that S.86 applied to all foreign States, whether the form of Government be monarchic or not. Therefore, the Government of India, in order to adopt this interpretation and also to align municipal law with the prevailing international law; amended Sec.86 of Code of Civil Procedure by (Amendment) Act, 1976 (Act 104 of 1976). This section continues to survive in its present form.

After the amendment, Sec. 86 of the CPC reads as follows:

Sec. 86: (1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary of that Government :

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a *foreign State* from whom he

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[19] Repeal of Sec. 197-A of Criminal Procedure Code by Amending Act of 1973.

[20] *Supra n.*10..

holds or claims to hold the property.

(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or classes of suits, the Court in which the *foreign State* may be sued, but it shall not be given, unless it appears to the Central Government that the *foreign State* –

(a) has instituted a suit in the Court against the person desiring to sue it, or

(b) by itself or another, trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) had expressly or impliedly, waived the privilege accorded to it by this section.

(3) *Except with the consent of the Central government certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.*

(4) The preceding provisions of this section shall apply in relation to –

(a) *any Ruler of foreign State*;

(aa) any Ambassador or Envoy of a foreign State;

(b) any High commissioner of a Commonwealth country; and

(c) any such member of the State *of the foreign State or the Staff or retinue of the Ambassador* or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf, *as they apply in relation to a foreign State.*

(5) *The following persons shall not be arrested under this Code, namely:*

(a) *any Ruler of foreign State;*

(b) *any ambassador or Envoy of a foreign State;*

(c) *any High Commissioner of a Commonwealth country;*

(d) *any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a*

Commonwealth country, as the Central Government may, by general order, specify in this behalf.

(6) *Where a request is made to the Central Government for the grant of any consent referred to in Sub-sec. (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard.*

The foregoing study shows that the doctrine of sovereign immunity had been codified in India as early as 1877, in several sections (431-434) of the Civil Procedure Code, 1877.

Apparently, the British Government in view of the complexity of circumstances arising from the existence of hundreds of Princely States on the Indian sub continent thought it expedient to retain in its own hands a leeway of flexibility in dealing with the rulers of these States when they were involved in legal cases, rather than leave it to common law and judicial interpretation. The overriding purpose was to treat the native Rulers and Princes in the manner as would best subserve the imperial interests and build them into solid props of the Empire.

The Indian law therefore provided for the right of the "foreign state" to sue in the Courts of British India for enforcement of the private rights of the head or of the subjects of the foreign State. However, this privilege was reserved for States which had been "recognised" by Her Majesty or her Indian Representative, the Governor-General of India.

It also provided for extending all facilities to the native Rulers in prosecution or defending their claims in Indian courts.

It certified that no native Prince or Ruler could be sued in the courts of British India without the express consent of the Government of India. It was this provision which enabled the British Government to control the circumstances in which and the extent to which immunity will be granted to native Rulers and Chieftains from the jurisdiction of the courts in British India.

The law also laid down the conditions for execution in British India of decrees of the courts operating in the territory of any native State.

These sections of the CPC were modified in 1908, and incorporated as Ss. 84-87 of the Code of Civil Procedure. There were further amendments after the transfer of power in 1947 and the cessation of British Paramountcy, leaving the native States to deal directly with the newly independent sovereign Indian Government. The amended Civil Procedure Code of 1951 was the response of the new Government in India to the changed situation and Section 86 of the CPC as amended in 1951 may be regarded as the bedrock of the law of sovereign immunity in India.

It will be observed that in India the codification of the law on the subject began and was complete much earlier than corresponding attempts in Great Britain, USA and other European countries.

Indian law and practice therefore provides a rich harvest of information and experience in the realm of sovereign immunity.

CHAPTER VII

DOCTRINE OF SOVEREIGN IMMUNITY IN INDIA: A STUDY OF JURISPRUDENCE OF THE COURTS

The evolution of the doctrine of sovereign immunity in international law passed through two important phases: first, the judicial interpretation by courts, and second, codification at the national and international level. Codification thus became a necessity, as the conflicting decisions given by the judiciary gave rise to confusion and complications which could not be resolved easily due to the technical impediments inherent in the Anglo-American theory of precedents. Therefore, the law in this field was in a state of flux and was uncertain. Hence, the second phase was aimed at spelling out the situations where sovereign immunity would be available and the situations exempted under this general rule.

In the absence of legislative guidance, courts have experienced difficulties in identifying and applying the appropriate rule of sovereign immunity deduced from conflicting precedents. The courts in India are no exception to this general trend as they follow judicial precedents set on the common law background. Although, India does not have a comparably elaborate statute like the FSIA in United States and SIA in United Kingdom, governing sovereign immunity of States; yet it had a

rudimentary framework of legislative provisions way back in 1877 at a time when rules of sovereign immunity in U.K. and U.S.A. were found only in judicial pronouncements. The Indian legislative initiative, however, seemed to have hindered the development of law in this field because of the fact that the access to courts on matters of sovereign immunity under these legislative provisions was controlled by the executive. Accordingly, the suits concerning the foreign State[1] including the Ruler of former Indian States reached the courts in India only after obtaining "consent" from the executive. Originally, the Civil Procedure Code, 1877 contained this provision in S.433.[2] This has been successively modified to make it commensurate with the structure of the Government[3], and it appears in its present form in Sec.86, of Civil Procedure Code.[4]

The implication of this legislative provision concerning sovereign immunity had been the subject matter of discussion in *Chandulal Khushalji* v. *Awad Bin Umar Sultan Nawaz Jung Bahadur.*[5] One of the question presented in that case was: whether the legislative provision which prescribes consent of the Governor-General-in-Council as a condition precedent to sue a foreign sovereign, in anyway altered the

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[1] For the relevant provisions see *supra.* Chapter VI.

[2] *ibid*

[3] *ibid*

[4] *ibid*

then prevailing absolute privilege doctrine or not. The court replying to this question held the view that the legislative provision represents a "modified form of absolute privilege".

Distinguishing the English and the Indian practice on this count, the court viewed that, in England the privilege was unconditional, dependent only on the will of the sovereign or his representative; whereas in India it was dependent upon the consent of the Governor-General-in-Council which could be given under specified conditions. This modified or conditional privilege was, however, based upon essentially the same principle of absolute privilege - the dignity and independence of the Ruler, which would have been endangered by allowing any person to sue him on whimsical or frivoulous grounds, and the political inconvenience and complications which would be resulting.

Hence in India, there was an important departure from the rule of international law laid down in the case of *Cristina*[6], because the Ruler of foreign State could be sued only with the consent of Central Government and proceedings in execution could also be taken only with the consent of Central Government.[7] *Mirza Ali Akbar Kashani* v.

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[5] **ILR** 21 Bom. 351

[6] 1938 *AC* 485.

[7] *Indrajit Singhji Vijay Singhji* v. *Rajendra Singhji Vijay Singhji, A.I.R.* 1956 Bom 45;*Manohar Singhji* v. *State of Rajasthan, A.I.R.* 1953 Raj. 22.

United Arab Republic[8] is a leading authority on this point, as conflicting judgments on this point by different High Courts[9] were resolved by citing this decision. According to this decision, Section 86 of CPC bars the application of principles of international law relating to sovereign immunity because it "makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international law".

It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so, Sec.86 provides that foreign States can be sued within the municipal courts of India with the consent of the Central Government and when such consent is granted it would not be open to a foreign State to rely on the doctrine of immunity under international law and argue that it is immune from the process of the courts because the municipal courts in India would be bound by the statutory

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[8] *A.I.R.* 1966 S.C. 230.

[9] See the different views expressed on this matter by the Calcutta High Court in *Royal Nepal Airline* case, *A.I.R.* 1966 Cal. 319 and *The German Democratic Republic* v. *The Dynamic Industrial Undertakings Ltd.*, *A.I.R.* 1972 Bom. 27 decided by the Bombay High Court.

provisions, such as those contained in the Code of Civil Procedure.

It may be noted that Sec. 86 grants immunity from suit in any court to "Ruler of a foreign state" with the consent of the Central Government. In substance, S.86(1) is not merely procedural, it is in a sense a counterpart of S.84, which confers a right on a foreign State to sue; whereas S.86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it, in S.86(1).[10]

In *Mirza Ali Akbar Kashani* v. *The UAR,*[11] the Supreme Court held that the expression "Ruler of a foreign state" does not mean that Sec.86(1) is applicable in cases only of Rulers of foreign states governed by a monarchical form of Government, on the contrary it is applicable to Rulers of all foreign States whatever be their form of government. If a foreign State is a Republic, then the Ruler of the said State would be the person who is recognised for the time being by the Central Government to be the head of that State.

In the instant case, the trial judge held that Sec. 86 did not bar the present suit because he accepted the plea of the appellant that the bar could be invoked only against the Ruler of a foreign State and not against the respondent which was an independent sovereign State.

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[10] *supra n.8.*

[11] *ibid.*

The High Court of Calcutta, in appeal, upheld the findings of the trial judge. It was held that the doctrine of international law which recognises the absolute immunity of sovereign independent States from being sued in foreign courts creates a bar against the present suit.

However, Supreme Court said: "Even when the Ruler of a State sues or is sued, the suit had to be in the name of the State..." As a matter of fact it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler.

Therefore, reversing the decision of the Calcutta High Court, the Supreme Court ruled that Sec.86 (1) applies to the present suit. It follows that in the absence of the consent of the Central Government as prescribed by it, the suit cannot be entertained.

On the question whether immunity can be claimed under general international law in case Sec. 86 was inapplicable, the court said that it is not necessary to deal with this question. It, however remarked, that if there is a specific statutory provision such as that contained in Sec.86 (1) which allows a suit to be filed against foreign State subject to certain conditions, it is the said statutory provisions that will govern the decision of the question as to whether the suit has been properly filed or not. In dealing with such question, it is

unnecessary to travel beyond the provisions of the statute, because the statute determines the competence of the suit.

Thus it follows, that the doctrine of immunity applied in India is subjected to the modification as provided for under S.86. However, this does not imply that S.86 wholly supplants the relevant doctrine under international law. This would only mean that the principles of international law would be applicable in India within the limitation laid down in S.86. It has an effect of modifying to a certain extent the doctrine of immunity recognised by international law. Earlier, international law immunity was absolute subject only to limitation recognised in international law. One such limitation being the waiver of immunity by a foreign sovereign. But, the limitation created by Sec.86 required the consent be given by the Government of India under S.86. Hence, the relevant principles of international law would still be applicable in India[12], once the condition laid down in Sec.86 is met.

It is clear, thus, that the doctrine of absolute immunity in favour of foreign States has not been accepted in India and the only immunity that foreign States enjoy under S.86 is a limited immunity from being sued without the consent of the Central Government.[13]

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[12] *The German Democratic Republic* v. *The D.I.U. Ltd.*, *AIR* 1972 Bom. 27.

[13] *supra n.5.*; and *Sagarmull Agarwal* v. *Union of India*, *AIR* 1980 Sikkim-22

The Meaning of "Consent" under Sec.86

This provision is applicable equally to both the foreign sovereign and, foreign State. However, no limitations were placed upon the power of Central Government to give such consent in the case of former Rulers of Indian States as were placed with respect to foreign rulers. Although the power of the Central Government in granting consent was no longer restricted by any legislative provisions, the existence of such consent was imperative and a condition precedent. If other conditions under S.86(1) read with Sec.87-B were satisfied then the absence of consent was fatal to the proceedings against the Ruler.[14] In case of a foreign State, the law is well settled for the last 30-35 years by a series of cases from *Mirza Ali Akbar Kashani* v. *U.A.R.*[15] to *D.S.R.* v. *N.C. Jute Mills Co. Ltd.*,[16] that the suit against a foreign State would be rejected in the absence of consent within the meaning of Sec.86.

Under the old provision, consent was necessary to enable a sovereign Prince or ruling Chief to be "sued" in any competent court. The term "Sued" includes every part of a suit, every step in it including the filing of the plaint and, therefore, the filing of the plaint must require

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[14] *Nawab Usman Ali Khan* v. *Sagarmal*, *AIR* 1962 MP 320.

[15] *supra. n.8*

[16] *AIR* 1994 S.C. 516.

consent as much as other and later proceedings. Under Sec. 433 of the Civil Procedure Code, 1882, a consent given by the Governor-General-in-Council after the commencement of a suit against a ruling Chief, consent not to the suit being instituted, but to its being proceeded with, was not a sufficient consent. If the consent had not been obtained before the commencement of the suit, the Court should dismiss the suit or allow the plaintiff to withdraw it with liberty to bring a fresh suit.[17]

In case of Sec.87-B as it stood prior to 1971, a person was sued not only when the plaint was filed, but also when the suit remained pending against him. The word "sued" covered the entire proceeding in action. Hence, the consent was necessary not only for the filing of the suit against the ex-Ruler but also for its continuation. Nor the suit could be maintained except with the consent of the Central Government. The prohibition, in Sec. 87-B, therefore, affected not only a suit instituted after the enactment of S.87-B but also the suit instituted pending the enactment.[18]

In a Karnataka case,[19] a suit for possession of immovable property was filed against the Ruler of a former Indian State without

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[17] *supra n.*5.

[18] *Mohan Lal Jain* v. *H.H. Maharaja Shri Sawai Man Singhji, Ex-Ruler of Jaipur, AIR* 1962 S.C. 73.

[19] *Bhairav Singh Maloji Rao Ghorpade* v. *Shankar Rao Bindu Rao Padaki, AIR* 1976 Karnataka 164.

obtaining the consent of Central Government under Sec.86 CPC, as the President of India had issued an ordinance de-recognising the Rulers prior to the institution of the suit. In the meantime the Supreme Court, by its decision dated 15.12.1970 struck down the ordinance. The plaintiff filed an application to the Central Government on 29.7.1971 and obtained its consent on 10.10.1971. The question that arose in this case was whether the petitioner had to obtain any consent from the Central Government, with a view to validly maintain the suit on 5.12.1970 - the date on which the Supreme Court struck down the ordinance. Considering the fact that during the pendency of the suit, by virtue of the Constitution (26th Amendment) Act, 1971 all former Rulers were derecognised and deprived of their special privileges, it was held by the Division Bench thus:

> As there was no necessity to obtain the certificate of consent on 5-12-1970, the suit must be construed as having been validly instituted. The fact that the order of the President was declared illegal and not to have been made at all by the Supreme Court, cannot have the effect of rendering the institution of the suit invalid since the suit was instituted on a date earlier to the date of the decision. Since the suit was validly instituted on 5-12-1970, it cannot be said to have abated on 15-12-1970 in the absence of any provision of law which provides for such ebatment.[20]

The Court further held in *Mohan Lal Jain* v. *H.H.Maharaja*

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[20] *ibid,* at p.167.

Shri Sawai Man Singhji [21], that the words "may be sued" in Sec. 86(1) includes the continuation of a suit already filed. The consent to a "suit being instituted" includes consent to continuation of the suit. Hence, the certificate of consent must be understood to mean that consent has been given to the continuation of suit which was pending in the lower court on the date the certificate was granted.

By virtue of the Constitution (26th Amendment) Act, it became no longer necessary to obtain the consent of Central Government under Sec. 87-B. Hence, after 26-12-1971, it could not be said that the suit instituted by the plaintiff was incompetent for want of consent of the Central Government. Since, the suit was pending on the date of Constitution (26th Amendment) Act, coming into force, the plaintiff was entitled to continue the suit against defendant after 29-12-1971.

Similarly, in a Sikkim[22] case, during the pendency of the suit, the defendant Union of India ceased to be foreign State, vis-à-vis Sikkim as a result of the operation of the Constitution (36th Amendment) Act, 1975, whereunder Sikkim was incorporated in the Union of India as a component State. Hence, the Court held on the basis of authority of the Karnataka High Court case[23] that the Court was entitled to proceed with the same.

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[21] *supra n.*18.

[22] *Sagarmull Agrawala* v. *Union of India, AIR* 1980 Sikkim 2.

[23] *supra n.* 19.

Justiciability of consent

The case law in this regard had seen a total transition from non-justiciability or refusal to grant consent to its total justiciability. The trend of earlier case law was that it was not open to the Courts to question the propriety or impropriety of the order of the Governor-General-in-Council, refusing to grant consent under Sec.86 of the Code. The only question before the Courts was whether the suit had been instituted with the consent of the Governor-General-in-Council.[24]

It was not part of the function of the Court to determine whether any of the conditions requested for giving of the consent existed, or even the question whether it had appeared to the Crown representative that one or more of them existed. The certified consent was in all ordinary cases conclusive evidence that it did so appear.[25]

The Supreme Court in a few earlier cases had cautioned that the power conferred by Sec. 87-B on the Central Government to accord or refuse consent to the proposed suit, must be carefully exercised. If the power to grant consent was not used for sifting claims which were far-fetched or frivolous, that might prevent the growth of discontentment in the minds of litigants against artificial provisions

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[24] *Mohammad Raza* v. *Kapurthala Estate, Bahraich, AIR* 1935 Udha 164.

[25] *Govind Ram Seksaria* v. *The State of Gondal by His Highness The Maharaja of Gondal, ALJ* 1950 P.C. 270.

presented by Sec. 87-B.[26]

Section 87-B authorised the Central Government either to accord consent or to refuse to accord such consent; it was not open to Central Government to impose any conditions on such consent, or to accord consent only in part, or to refuse it in part, particularly in cases where reliefs were claimed on one and the same cause of action. If it was held that the Government can impose conditions in granting consent, it would virtually be conferring jurisdiction on the Central Government to adjudicate upon the dispute; and that was not the object of Sec. 87-B.[27]

Sovereign Immunity and Commercial Activities

The question of sovereign immunity is inextricably linked with commercial activities undertaken by States or by their agencies on behalf of the States. In an early case[28] a suit was brought against a defendant who was described as "*The Gaikwad of Baroda State Railway*" through the Manager and Engineer-in-Chief of the State Railway. It was found that the above Railway was neither a State Railway nor a Company Railway but was owned and managed by H.H. the Gaikwad of Baroda and that the provisions of Ss. 86 and 87

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[26] *Jaswant Singhji Judeo* v. *The Union of India, AIR* 1970 Delhi 190.

[27] *Maharaj Kumar Tokendra Bir Singh* v. *Secretary, Ministry of Home Affairs, AIR* 1964 S.C.1663.

[28] *Gaikwad of Baroda State Railway* v. *Hafiz Habib-Ul-haq, AIR* 1938 P.C. 165.

applied to the case. In this case the plaintiff, a timber merchant, entered into contracts for the supply of sleepers for the Gaekwar Baroda State Railway, which was admittedly owned by the Maharaja of Baroda and managed by his servants. The contracts which were made in Baroda, were signed by the Manager and Engineer in Chief, Baroda State Railway. Subsequently, the contracts were cancelled on the ground that the sleepers delivered were not in accordance with the contract specifications. The plaintiff thereupon instituted proceedings against the Gaekwar through the Manager of the Railway claiming the balance of the price or the sleepers and damages for failure to take delivery of the remainder. It was held by the Privy Council that the Railway Administration was not intended to be, and was not, a legal entity or establishment as a 'corporation' which could be sued through the head of the Railway Department. The suit was in reality, though not in form, one against the Gaekwar of Baroda, a Sovereign Prince within the meaning of Sec.86 and in as much as no certificate sanctioning the bringing of the suit had been obtained as provided in Sec.86 (1) of the Code, the suit was not maintainable in the courts of British India.

It was however conceded by Sir William Jowitt, Counsel appearing for the Gaekwar State Railway, that if the Railway was owned and managed by a corporation, then Sec.86 had nothing to do with the case.

The Privy Council noted that the defendant Railway is owned by H.H. the Maharaja of Baroda, a sovereign Prince and is managed by His Highness' Government. The claim against the Manager Engineer, who is only a paid servant of the state, is bad in law.

Similarly, a suit against the Patiala State Bank which was owned by H.H. the Maharaja of Patiala could not be instituted without the consent required under Sec.86.[29] In another case it was held that the Jodhpur Railway was the property of the Jodhpur Darbar and the sanction of the Central Government under Sec.86 was considered necessary for a suit against that Railway.[30]

It has been contended many a times in the Indian Courts that on account of enormous increase in trading activities of foreign States when a sovereign State engages in commercial activities it sheds its sovereign character and, in the words of Lord McMillan in the *Cristina* case[31], enters "competitive market of commerce". Reliance has been placed many a times on the dissenting opinion of Lord Denning in *Rahimtolla* case and also the views of authors like *Sompong*

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[29] *Darbar Patiala through S.Ajmer Singh, Managing Director of Patiala State Bank, Patiala* v. *Firm Narain Das Gulab Singh of Jagadhari through Kr. Kishori Saran, AIR* 1944 Lahore 302.

[30] *Ishmal Haji Osman* v. *Gondal Railway, A.I.R.* 1951 Saurashtra 16.

[31] *supra n.6.*

Sucharitkul[32] and *Lauterpacht*[33] to argue that sovereign immunity should not depend on whether a foreign Government is impleaded directly or indirectly, but on the nature of the dispute.

Indian Courts have very consistently and conservatively adhered to and relied upon the *Cristina* case[34], *Mighell* v. *Sultan of Johore* [35], *Krajina* v. *Tass Agency* [36], *Baccus SRL* v. *Servicio Nacional del Trigo* .[37] The prevailing general judicial trend is that a suit would not lie against the "Department" of a State but if the "Department" is a "Corporation" with the sole power to hold and acquire property and the right to sue and the liability to be sued, i.e. it is an incorporated body with juristic personality carrying on business in the country where proceedings are started against it, it will be outside the umbrella of immunity. But a commercial body even holding the nomenclature of a corporation can be certified by the ambassador of a foreign State as a

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[32] S. Sucharitkul, *State Immunities and Trading Activities in International Law*,(Stevens & Sons Ltd., London, 1959).

[33] H. Lauterpacht, "The Problem of Jurisdictional Immunities of foreign States", 28 *BYIL* (1951), p.220.

[34] *supra n.6.*

[35] (1894) *QB* 149. The following passage from *Mighell* v. *Sultan of Johore*, has been relied upon in many cases:

> If the dispute brings into question the legislative and international transactions of a foreign Government or the policy of its executive, immunity from process should be granted, but if the dispute concerns the commercial transaction of a foreign Government and arises properly within the territorial jurisdiction of our courts immunity should not be granted.

[36] (1949) *All. E.R.* 274.

[37] 1957 *QB* 438.

Department and not a corporation. Indian Courts have consistently accepted such pleas. In this connection a case that was filed against Royal Nepal Airlines Corporation for claims of damages, before the Calcutta High Court deserves mention.[38] The facts of the case were as follows:

The plaintiffs in this suit were Manorama Mehere Singh and her minor children, Pantab Singh Legha, Aruna Legha and Trithy Singh Legha. The defendant was the Nepal Airline Corporation as a body corporate incorporated under the laws of Nepal.

The case of the plaintiff was that Meher Singh Legha, the husband of the first plaintiff and the father of the second and third plaintiffs, was killed in an air crash accident on duty as a pilot in R.N. Airline Corporation, due to the negligence or breach of duty of the defendant. The plaintiffs claimed a sum of Rs.8,42,500 as damages for the loss suffered by them due to the death of Meher Singh Legha.

This is very important case as it dealt with three important legal issues. First, claim of sovereign immunity was raised by an independent corporation, a separate legal entity. Second, this was one of the cases concerning civil wrong (tort) where sovereign immunity was claimed by the defendant. Thirdly, it raised a question as to whether entering upon appearance by a party, which claims sovereign

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[38] *Royal Nepal Airline Corporation* v. *Manorma Mehar Singh Leghe*, *AIR* 1966 Cal 319.

immunity would amount to waiver of immunity or not.

The court considered the following facts in support of the claim of sovereign immunity by R.N. Airlines, namely, the Act establishing Royal Nepal Airlines Corporation did not come into force in its entirety, except for Sec.1 of the Act which provides that the said Act was to be called "The Royal Nepal Airlines Act 2014 SY" and the aircraft therefore remained only as the property of government as it was acquired in or about 1959 from the United States Aid Programme. The expenses of the Airlines were met from Government revenues and all receipts and profits similarly formed part of Government revenue. Secondly, the certificate issued by the Secretary of the Government of India in the Ministry of External Affairs had been inferred by the Court that, the case filed was in reality against a Ruler of a foreign State and/or a foreign State. The Govt. of Nepal and or its Ruler enjoys full and complete immunity and exemption from the powers of the court. Thirdly, the submission of jurisdiction by Nepal Ambassador had not been considered by the court as a waiver as it held the view that, the submission to jurisdiction of the court never dis-entitled the defendant of sovereign immunity.

Justice G.K. Mitter in his concurring judgment referred to several decisions and sought to state the principles that could be deduced from the said decision.

One of the principles that could be said to be deduced from the decision was that a suit would not lie against an agent or a foreign state where the act complained of was purported to be done as such an agent.

Secondly, he observed that a suit would not lie against a department of the state even where the department was named a Corporation with sole power to hold and acquire property, and right to sue and the liability to be sued.

The court also reviewed the status of international law of the sovereign immunity as interpreted and understood by English and American courts and finally held that the Royal Nepal Airline Corporation "was a Department of the Government of Nepal and as such was entitled to claim immunity from the process of Indian court to exercise its jurisdiction in respect of the claim of damage which had been brought by the plaintiff."[39]

Similarly in a later case filed against the Nepal Film Corporation[40], the suit was held not to be maintainable on the ground of absence of permission under Sec.86 CPC.

The common undertone of all the above cases has been that an agency owned/operated by State (or sovereign Prince, as the case

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[39] *ibid,* p.320

[40] *Bidhubhushan Prasad* v. *Royal Nepal Film Corp. Ltd., AIR* 1983 N C 75 (Cal.).

may be) could not be sued even though ostensibly these were directly engaged in some sort of commercial activities. The line of distinction between a Department and a Corporation as is normally understood, has already been diluted by the Indian courts, This is quite strange, because on the one hand Indian courts have proclaimed that the Indian law does not provide unrestricted immunity, on the other hand there is definite judicial conservatism in viewing commercial acts directly undertaken by or on behalf of the State, as not being liable to suits in the absence of consent under Sec.86 CPC.

In fact, distinguishing between Department and Corporation (while both are carrying on commercial activities) and according immunity to the former while denying it to the latter has only added to the confusion.[41] Moreover, the courts become helpless as the law only provides a guideline to Central Government to grant consent if the dispute relates to foreign State who trades within the jurisdiction of the court. The lack of a more specific provision has led the courts to adhere to conservative opinion in this regard.

The case of *New Central Jute Mill Co. Ltd.* v. *Veb Deautfracht Seereederej Rostock (D.S.R. Lines) & Dept. of German Democratic*

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[41] It has been mentioned earlier that a country like U.K., a strong supporter of unrestricted immunity, has changed its position drastically through Sec.3 of British State Immunity Act, 1978, which removes all commercial activities undertaken by State beyond the protection of immunity. Sec.14(1) also does not give any immunity to commercial activities of "separate entities".

Republic[42] provided a departure from the above conservatism in judicial thinking. The Court tried to interpret, Sec.86 in the light of some contemporary English judgments and the British State Immunity Act, 1978. It would be worthwhile to mention briefly the facts of the case.

The plaintiff purchased spare parts and accessories for its plant from the Neuman & Esser, German Democratic Republic. It was the case of plaintiff that it duly paid the purchase price and ownership in goods passed to them. The goods were shipped to India through the defendant D.S.R. Lines and were damaged in transit. The suit was filed against D.S.R. Lines, the carrier, under the Bill of lading. The defendant contended that it was a department and/or agent and/or instrumentality of the Government of German Democratic Republic. It asserted that the GDR had been recognized by Government of India as a sovereign foreign State and that all 'water and air transport' are State property. It was, therefore, contended that the suit was not maintainable in as much as no consent of the Central Government had been obtained prior to institution of the suit. The certificate granted by Consul General of German Democratic Republic was produced. It stated: "*Ver Deautfracht Seereederej Rostock*, abbreviated as D.S.R., commonly known as DSR Lines constitutes a department of the

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[42] *AIR* 1983 Cal. 225.

Government of the German Democratic Republic exercising the rights of a legal entity."

Art. 12 of the Constitution of German Democratic Republic on which reliance was placed in this case, reads as follows:

> Mineral resources, mines, power stations, barrage and large bodies of water, the natural resources of the continental shelf, the large industrial enterprises, banks and insurance companies, nationally owned farms, traffic routes, the means of transport of the railways, ocean shipping and civil aviation and telecommunication installation are nationally owned property, private ownership thereof is inadmissible.

The main question in this case was that when the suit expressly or *ex-facie* was not against a foreign State by name as such, will Sec.86 still apply if it is contended that in reality the suit is against an organ or institution which forms part of that State.

The Court relied on the observation of Lord Justice Stephenson in *Trendtex Trading Corpn.* case [43], thus:

> The courts should be extremely careful not to extend sovereign immunity to bodies which are not clearly entitled to it and therefore, it is necessary that in order to extend the restriction to bodies other than State by name there must be clear expression of intent of legislature to enable the courts to come to their conclusion. After all, this is a restriction on the rights of the citizens of a State to institute suits in respect of injuries suffered by them. Therefore, if the provision of the statute is clearly expressed, then of course, the courts must give effect to the same. But in interpreting the statute it must clearly safeguard to see that there is no extension of curtailment of rights of citizens.

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[43] (1977) *All ER.* 881 p.889.

The court also took into account observation of Lord Denning in the same case, that in respect of commercial transactions the Government did not enjoy immunity even though an incorporated body might become a part of the State.

Taking the above into consideration, the court held that it is quite apparent on plain reading of the expressions used in Sec.86, that such restriction does not apply to organs of a foreign State or against a body or an organ which is even part of the foreign State. On the question whether DSR Lines was part of German Democratic Republic or a separate entity, the court held that it was a separate entity, and as it had the power of appointing the Constituted Attorney, it had also the power to appoint agent. It held further that it was self evident from the suit that it was not against the foreign State as such and name of German Democratic Republic did not appear. It is also significant to bear in mind that it was not the case of respondents that a suit against D.S.R. Lines did not lie at all. What was claimed was that such a suit could not be instituted without the consent of the Central Government as enjoined by Sec.86.

In view of the above observation it was held that the suit not being *ex-facie* against a foreign State, Sec.86 had no application. Sec.86 is confined to suits against a State by name as such and in coming to this conclusion support could be had from the principles of

interpretation that in making construction of a statute, which is not explicit, it should be in consonance with the general principles of international law. Under the general principles of international law, had not there been Sec.86, a suit against the department of the foreign State would still lie and it would be for the department to claim immunity. If such immunity is availed of, the Court is to grant such immunity. It would not be proper to curtail that right when the legislative intent was clear and expressive of this point. The Court viewed that such legislative intent was not explicit and hence, it was held that in the present case, Sec.86 had no application.

The above is a landmark judgment where the High Court of Calcutta tried to bring the Indian law in harmony with the perception of international law elsewhere. The learned Judge went to the extent of expressing his personal opinion that immunity in respect of commercial transaction would not be in consonance with justice, equity and good conscience.

Harbhajan Singh Dhalla v. *Union of India*[44] in its own way carried forward the above judicial view. This case explains how difficult it is to obtain the consent of Central Government even in a matter which was commercial in nature. It was the case of the petitioner in the instant case, that he had undertaken general maintenance work at the

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[44] *AIR* 1987 S.C.9.

Embassy of Algeria in India and at the residence of the then Ambassador of Algeria in New Delhi in the year 1976. He claimed that his rightful dues in respect of the said work which run into more than Rs.28,500/-, had not been paid by the Embassy. The petitioner had approached the Ministry of External Affairs for granting permission to sue the Algerian Embassy for recovering his dues. After writing a number of letters and passage of number of years, the Ministry of External Affairs wrote a letter to the petitioner dated 26 Nov. 1983 stating, *inter alia*, "After due consideration, the Government of India regrets that permission to sue the State of Algeria cannot be given on political grounds". However, the respondent, Union of India, in its affidavit, had stated that "after giving due consideration, the Ministry was of the opinion that no *prima facie* case had been made out and it was decided not to grant permission to the petitioner."

While considering the case the court took strong exception to the propriety of the decision - making power of the Union of India under Sec.86 of the Civil Procedure Code in the following manner:

> It is submitted that under S.86, paras (1) and (2), the Central Government has discretion to refuse consent as required under that section. In this application, the court is not concerned with the correctness or genuineness or otherwise of his claim or assertion, except perhaps *prima facie* maintainability. What concerns this court is whether the grievances of the citizen of this country have been properly and legally dealt with.

It went further and stated that the Union of India which

has indubitably the jurisdiction and obligation in the appropriate case but the Union cannot in any arbitrary manner or administratively adjudicate those disputes or determine the claim. On the invocation of "political ground" by the defendant the court observed that "it connotes without further particulars a vague and fanciful attitude."

On considering the absence of appeal provision from the order of the Central Government in either granting or refusing to grant sanction under Sec.86 of the Civil Procedure Code the court observed thus:

> This sanction or lack of sanction may, however, be questioned in the appropriate proceedings in court but inasmuch as there is no provision of appeal, it is necessary that there should be an objective evaluation and examination by the appropriate authority of relevant and material factors in exercising its jurisdiction under Section 86 by the Central Government. There is an implicit requirement of observance of the principles of natural justice and also the implicit requirement that decision must be expressed in such a manner that reason can be spelled out from such decision. Though this is an administrative order, in a case of this nature, there should be reasons. If the administrative authorities are enjoined to decide the rights of the parties, it is essential that such administrative authority should accord fair and proper hearing to the person to be affected by the order and give sufficiently clear and explicit reasons. Such reasons must be on relevant material factors, objectively considered. There is no claim of any privilege that disclosure of reasons would undermine the political or national interest of the country.

While considering the plea of the Government of India that the dignity of the foreign State and relationship

between two countries should be considered in cases of application for consent to sue a foreign State, the court wondered :

> In respect of a building where a masonary work was supervised by a contractor or an architect, how the dignity of a foreign State or relationship between the countries would be jeopardized, undermined or endangered. One should have thought that the political relationship between the two countries would be better served and the image of a foreign State be better established if citizens' grievances are judicially investigated.

It is important to note that the Court in this case weighed the prevailing contemporary judicial trend in the United States and U.K. and held the view thus:

> It appears to us that a foreign State in this country, if it fulfills the conditions stipulated in sub-section (2) of Sec.86 of the Code, would be liable to be sued in this country. That would be in conformity with the principles of international law as recognised as part of our domestic law and in accordance with our Constitution and human rights. The power to the Central Government must not be exercised arbitrarily or on whimsical grounds but upon proper reasons and grounds.

The Court, taking into account statutory developments in this field in other countries and also case laws, said:

> In the days of international trade and commerce, international opening of embassies, in granting sanction (of consent with reference to Sec.86 Civil Procedure Code) this aspect has to be borne in mind. The interpretation of the provisions of the Code of Civil Procedure must be in consonance with the basic principles of the Indian Constitution.

In conclusion, the court *inter alia*, directed the Union of India to reconsider the matter. The Union of India was further directed that "it should pass reasoned order, in accordance with the principle of natural justice and keeping in view the trend and the development of international law as noted hereinbefore."

VDS Rostock (DSP Lines) a Department of German Democratic Republic v. *New Central Jute Mills Co. Ltd. & others*[45], reversed the entire trend of development of international law discernible in above cases. This is the latest Supreme Court case available on the subject, which reversed the judgment of Calcutta High Court in *New Central Jute Mill Co. Ltd.* v. *Deautfracht Seereederei Rostoere (D.S.R. Lines) & Department of German Democratic Republic.*[46] The contentions of respondent in this case were similar to those made at the High Court stage. It was contended that since the dispute had arisen in connection with a commercial contract, Sec.86 would not be applicable. According to the respondent, the framers of the Code, while recognizing the sovereignty and immunity of the foreign State on the principles recognized by the international law, never purported to give immunity to the breach and contravention of the terms of a contract entered on behalf of the foreign State, which

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[45] *AIR* 1994 S.C.516.

[46] *supra. n.* 42.

has nothing to do directly or indirectly with the sovereignty of one State or the other but relates to commercial trade, between the two States. There cannot be any conceivable object to keep such contracts within the scope of Sec.86.

However, the Supreme Court relied upon *Baccus S.R.L.* v. *Servicio Nacional del Trigo*[47], *Krajina* v. *Tass Agency*[48], and *Royal Nepal Airline Corporation* v. *Manorama Meher Singh Lagha*[49] for the proposition that a department of a State even while engaged in some commercial activity is entitled to claim immunity. And on the basis of evidence adduced, the court considered D.S.R. Lines to be a department of German Democratic Republic. If sub-section (2)(b) of Sec.86 itself prescribes that the consent to sue shall not be given unless it appears to the Central Government that the foreign State which is being sued, itself or by any authority, trades within the local limits of the jurisdiction of the court, how it can be held that such consent is not required in connection with commercial contract. Hence, commercial contracts relating to trade and business having been entered on behalf of a foreign State are not beyond the purview of Sec. 86 of C. P.C.

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[47] *supra n.*37.

[48] *supra n.*36.

[49] *supra n.*38.

But the court also mentioned that the Central Government is expected to examine the question of consent objectively. Once the Central Government is satisfied that a cause of action has accrued to the applicant against any foreign company or corporation, which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of international law should not be stretched to a limit, so that a foreign company and a corporation, trading within the local limit of the jurisdiction of the court concerned, may take recourse of Sec.86, although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Sec. 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss or injury to plaintiff. The court added:

> If it appears to the Central Government that any attempt on the part of the plaintiff to sue a foreign state is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent.

The question is: was the application in this case motivated by the desire to harass or drag the GDR in frivolous litigation? Did not the New Central Jute Mills have a purely commercial activity, even if it be conceded that it was a department of the G.D.R.?

The court should have pondered over these questions before coming to a conclusion that the plaintiff - respondent not having obtained the consent of the Central Government, the suit was not maintainable. The question is whether the withholding of consent by the Central Government justified? Was it not bad in law?

However, in absence of the consent of Central Government, following straight language of Sec.86 the Supreme Court felt that the court is barred in view of Sec.9 of the CPC which recognises the limitation on courts to try any suit the cognizance whereof is expressly or impliedly barred.[50] Thus, the appeal was allowed in the above case and the judgement of Calcutta High Court was reversed despite the fact that the D.S.R. Lines was ostensibly engaged in a purely commercial activity.

As of now, we stand at a crossroads where the Supreme Court despite its best intention to conform to changes taking place in the world in the law of sovereign immunity due to expansion in global trade and commercial activities, still finds itself "cribbed, cabined and confined" - to use a Shakespearean phrase – by the archaic language of Sec.86 which still requires the 'consent' as an essential prerequisite for filing a suit against foreign State even in case of commercial transaction; which otherwise would definitely fall within the ambit of

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[50] *supra n.45*, p.518

courts authority in their respective municipal laws (without any such formality) in United States, Britain, Canada, Australia, etc.

Today the Central Government may grant consent in some cases and refuse in some other on political grounds or sometimes refuse on more than one but contradictory grounds.[51] The Supreme Court has come down heavily on such orders refusing sanction to sue the foreign State. In *Shanti Prasad Agarawalla* v. *Union of India*[52] wherein, the owner of the premises No.31, Shakespeare Sarani, Calcutta, which was in the occupation of the Consulate General of USSR as tenant, sought consent of the Central Government for suing the Consulate General of USSR for eviction on the expiry of the tenancy and upon the issuance of proper notice, the Central Government did not respond to the request of the petitioner / owner of the premises within reasonable period of time. The petitioner had filed a writ of mandamus in the High Court of Calcutta to direct the Central Government to take a decision on their application for consent. The court directed, on 21st Jan., 1982, the Central Government to dispose the application in accordance with law, after giving the petitioners an

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[51] In *Harbhajan Singh Dhalla* v. *Unoin of India, A.I.R.* 1987 S.C. 9. Central Government refused consent on two but contradictory grounds namely, first, "there is no *prima facie* case" and secondly, on "political grounds".

[52] *AIR* 1991 S.C.814.

opportunity of being heard, as early as possible, preferably within a period of four months from the date of the order.

Despite the passing of the said order the Central Government failed to dispose of the application within the said time. The petitioners filed a second writ petition in the same court and got a direction in their favour that the Central Government should dispose the application within a month's time. But, the Central Government did not dispose the application. In the meantime the petitioners had filed a writ petition under Article 32 of the Constitution of India before the Supreme Court of India. Knowing the fact that the petitioners have moved the Supreme Court, the Central Government had passed the following order:

> With reference to our correspondence with you regarding your application for permission for legal action against the consulate General of the USSR, 31, Shakespeare Sarani, Calcutta, under Sec.86 of the Civil Procedure Code, I am directed to state that this Ministry is unable to give permission to you on political grounds for such action.

In consequence of this order the petitioners had amended the pending writ petition in the Supreme Court and prayed for quashing the order passed by the Central Government. The Court did not agree with the reason given by the Central Government, and observed:

> It is difficult to comprehend what is meant by the expression "political grounds" used in the impugned order. It is not clear what political considerations necessitated the rejection of the application. The Central Government while considering the application under Sec.86 of the

> Code must decide the application in accordance with the provisions of the section itself and state clearly and intelligibly its reasons for rejecting the application. In the instant case, we are unable to appreciate what political considerations weighed with the Central Government for rejecting the application.

In conclusion the court had quashed the impugned order and remitted the matter to the Central Government "for taking a fresh decision in accordance with law after giving an opportunity to the petitioners of being heard".

While setting aside the refusal orders, the Supreme Court has issued direction to reconsider the matter and to explore the possibility of a mutual settlement. The Central Government while considering the application under Sec.87 of the Code must decide the application in accordance with the provisions of the section itself and state clearly and intelligibly its reasons for rejecting the application.

In a very recent case, before the Delhi High Court[53], relating to granting of consent to file suit against United Nations' High Commissioner for Refugees, for payment of his share of rent for the rented premises, there had been violation of the principles of natural justice in as much as no hearing was afforded to the petitioner before turning down his prayer. The Central Government pleaded that as the petitioner was not willing to give credence to the advice (of amicable

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[53] *Sahil Marwah* v. *Union of India*, dt. Nov. 9, 1995, C.W. 3/95

settlement) by them, it was not felt fruitful to hear him in person suo-moto. However, the court held that the Central Government had gone beyond the scope of its authority and jurisdiction while considering the request for granting permission to sue by dealing with the merits of the claim, which was the function of the courts. Hence, the impugned order of Central government was set aside with the direction to afford due hearing to the petitioner.

It may be mentioned that there is no provision of any appeal from the order of the Central Government in either granting or refusing to grant sanction under Sec.86 of the Code. This sanction or lack of sanction might, however, be questioned in the appropriate proceedings in the court. But unless there is a provision of appeal, no one can ensure that the objective, evaluation and examination by appropriate authority of relevant and material facts in exercising its jurisdiction under Sec.86 by the Central Government is taking place.

The foregoing discussions reveal that the Ministry of Externa Affairs is not in favour of granting consent to sue foreign State even ir cases concerning commercial transactions. The court is also helpless except to lay an implicit requirement of observance of the principle c natural justice and also an implicit requirement, that decision must b expressed in such a manner that reasons can be spelt out from suc decision.

WAIVER OF SOVEREIGN IMMUNITY UNDER INDIAN LAW

The rule on Waiver is an exception to the doctrine of sovereign immunity. It means that a foreign State may voluntarily submit to the local court's jurisdiction without claiming immunity, in which case it will be deemed to have waived the privilege to which it was entitled under international law.

Waiver may be both express and implied. It may take the form of a formal note or even a bilateral treaty.

Waiver may be implied from the actual conduct of the foreign state, but what conduct constitutes implied waiver is a justiciable matter and has to be decided from case to case.

It must be understood that waiver of immunity from process does not imply immunity from execution, unless there is clear evidence to the contrary.

Courts in Civil Law countries have been especially liberal in presuming that certain activities constitute an implied waiver.

Earlier decisions of the Bombay High Court[54] and Patna High Court[55] clearly held the view that privilege under Sec.86 could be waived by conduct. The Privy Council, however, in a later case held

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[54] *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burman*, **ILR** 9. Cal. 535, at p. 556.

[55] *Maharaja Bahadur* v. *Siva Saran*, (1921) 6 *OAT, L.J.* 135.

that Ss. 86 and 87 were related to an important matter of public policy in India. The provisions contained therein were imperative and had to be observed and having regard to public purpose they serve, they could not be waived. [56]

This decision overruled the above cited decisions of Bombay and Patna High Courts. Later this was followed in a long line of cases such as *Madan Lal Jhunjhunwala* v. *H. M. the Nawab Syed Raza Ali Khan Bahadur Mustaid Jung, Ruler of Rampur State of U.P.*[57]; *Thakur Saheb Khanji Kashari Khanji* v. *Gulam Rasul Chand Bhai*[58]; and *Inderjeet Singhji Vijay Singhji* v. *Rajendra Singhji Vijaysinghji.*[59] The legal positions maintained till 1951 was that immunity arising under Sec.86 is not waivable.

A change has been brought through Clause (d) of sub-section (2) of the old Sec. 86 sustained in 1951, which modified the legal position taken by the above decisions. According to them, the privilege accorded could be waived by the Ruler of a foreign State either expressly or impliedly. Similarly, under Sub-section (2) Clause (d) and Sub-section (a) and (d) of the present section also, a foreign State or a Ruler of foreign State can waive the privilege.

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[56] *Gaikwad Baroda State Railway* case, *supra n.* 28.

[57] *AIR* 1940 Cal 244.

[58] *AIR* 1955 Bombay 449.

[59] *supra* n. 7.

Implicit Waiver

The question of implicit waiver[60] or waiver by conduct depends upon facts and circumstances of the case. In *Ladkuver Bai* v. *Sarsangji Pratab Sangji* [61], an *ex parte* decree was passed against the Ruler of an Indian State. The defendant successfully applied to set aside the decree on account of his misdescription in the proceedings. The application was dismissed on the ground that it was too late. Subsequently, after the plaintiff had applied for execution of the decree, the defendant applied to set aside the decree on the ground that he was an independent sovereign Prince and as such the decree was passed without jurisdiction. The plaintiff contended that defendant had submitted to the jurisdiction of the court and had waived his claim for immunity. The court rejected this contention and held that the defendant, if originally privileged from suit, had not in any way waived that privilege by acquiescence in the jurisdiction of the court. Every step he had taken had been in denial of that jurisdiction.

Waiver cannot be deduced from the act of intervening, entering appearance and filing written statements claiming that court had no

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[60] Both the continental judicial decisions and juristic opinions hold that immunity can be waived expressly or by implication. It is even not necessary that waiver should take place "in front of the court". See for further discussion on this issue M.K. Nawaz, "the Problem of jurisdictional Immunities of Foreign States with Particular Reference to Indian State Practice", 2 *IJIL* (1962) p.181.

[61] 7 Bom *H.C.O.C.* 150.

jurisdiction to try suit.[62]

The judicial decisions in India have been influenced by some of the English decisions in *Baccus S.R.L.* v. *Servicio Nacional del Trigo*[63] and *Vavasseur* v. *Krupp*,[64] which held that limited submission without the knowledge of foreign Government does not amount to waiver.

An un-conditional appearance, absence of denial of jurisdiction based on the claim of sovereign immunity, appearance for adjournment and prayer for examination of witness may not amount to waiver. In the Royal Nepal Airlines Corporation case, there was nothing to show that the written statement was made by a person with the knowledge of right to be waived or that it was filed with the authority of King of Nepal. Hence, in the absence of anything to show that there is any unmistakable decision to submit to court's jurisdiction or any deliberate abandonment of right to claim sovereign immunity for which an unequivocal intention to submit to jurisdiction can be inferred; waiver of immunity can not be proved.[65]

The case of *I.N. Steamship Co. Ltd.* v. *Maux Faulbaum*[66] needs detailed mention here in order to understand how extensive

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[62] *Mohammad Raza* v. *Kapurthala Estate Bahraich*, *AIR* 1935 Oudh 164.

[63] *supra. n.*37.

[64] (1878) 9 *Chd* 351.

[65] *supra n.*38.

[66] *AIR* 1955 Cal. 491.

submission to jurisdiction has been deemed to be waiver. The fact of the case were as follows:

The Indonesian Purchasing Commission which is a department of the Defence Ministry of the Government of Indonesia purchased 51 reels of cable in Hamburg and shipped the said goods for carriage from Hamburg to Djakarta under a bill of lading. The vessel altered its course and at the direction of the owner company proceeded to Calcutta and there unloaded the entire cargo which was on board the vessel. The owner Company (The Indian National Steamship Co.) filed a suit thereafter against Maux Faulbaum, the charterer of the said vessel, claiming sums alleged to be due to it on account of arrears of hire of the said vessel and claiming a lien on all goods on board the said vessel, including the 51 reels of cable. The Calcutta High Court appointed a Receiver for the entire cargo. The petitioner, the Indonesian Purchasing Commission, claiming a superior title to that of the Receiver made an application to the court for possession of the goods.

Subsequently, on the request of the Indonesian Embassy in India, the Ministry of External Affairs of the Government of India sent them a certificate to the effect that the said goods being the public property of the petitioner, which was a foreign State, were immune from the legal processes of the courts in India.

On this basis the Republic of Indonesia moved the High Court again for the possession of goods in question. It was held that there could not be any doubt that the petitioner had submitted to the jurisdiction of the court and had waived its privilege to claim immunity from the jurisdiction of the court. The Republic of Indonesia, by its application for leave to be examined *pro intersse suo* came forward to establish its title to the goods as against the adverse claim of the plaintiff in the suit, and had also asked the court to investigate into the question of title of the Republic. The court ordered an inquiry, as asked for, and gave certain direction as to costs of that application. The petitioner had also requested to examine witness in Holland to prove the title of the petitioner. A conditional order was made by the court, and the condition was complied with by the petitioner. Hence, there could not be any doubt that the petitioner had submitted to the jurisdiction of the court and had waived its privilege to claim immunity from the jurisdiction of the court.

This case was similar to *Sultan of Johore* v. *Abu Bakar*[67] where the appellant had been respondent to the originating summons which was in substance an appeal in proceedings which, by force of the Japanese Judgments and Civil Proceedings Ordinances, 1946 of Singapore were a continuation of the very proceedings which he had

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[67] 13 (1894) *QB* 149.

himself instituted and accordingly he was treated as having submitted to the jurisdiction in the respondent's current proceedings and could have, therefore, waived his immunity.

This case was different from *Vavasseur* v. *Krupp*[68] case on the ground that in the latter case Mikado of Japan only moved the court for the permission to move the goods belonging to the State of Japan, notwithstanding the injunction restraining the defendant from parting with the goods. The Mikado only submitted to the jurisdiction of the courts as to discovery, as to process and as to costs. The Mikado made a conditional appearance in the action and applied to be added as a defendant from a fetter which had been put upon it by the order of injunction. As such by this limited submission to jurisdiction the Mikado did not lose his right to claim immunity from the process of the municipal courts, in respect of the public property of his country.

In another case of *United Arab Republic* v. *Mirza Ali Akbar Kashani*[69] the contention was that the appellant had waived his claim to immunity by: (a) entering unconditional appearance in the suit, (b) by applying for rejection of the plaint on the basis of a claim of immunity under Sec. 86 of the Civil Procedure Code and (c) by applying for the revocation of the leave granted under Clause (12) of

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[68] *supra n.*64.

[69] *supra n.*8.

Letters of Patent.

In the eye of law, a denial of jurisdiction is certainly not submission to jurisdiction. Waiver is an intentional abandonment of a right. Therefore, the Calcutta High Court held that, the appellant did not by entering appearance and by making the application intended to waive its claim to immunity.

But sometimes waiver has been deduced from the conduct of foreign State. A leading authority on this point is *Sagarmull Agarawalla* v. *Union of India*.[70] This was the case where the Union of India was sued in the Sikkim court in 1972 when Sikkim was a foreign State Union of India did not plead sovereign immunity from being sued and entered appearance in the suit, prayed for and obtained several adjournments to file written statements, had large umber of issues framed, filed large number of documents to be used as evidence, went to the trial and adduced evidence, both oral and documentary and raised the plea of absolute immunity under international law for the first time only when arguments were being heard on 26.11.1975. By that time, as a result of Constitution 36th Amendment Act, 1975, Sikkim already became incorporated in the Union of India as a component State and the Union of India ceased to be foreign State vis-a-vis Sikkim. It was held that a foreign State is not bound to and may not

[70] *supra n.* 22.

raise plea of immunity from being sued in courts of other sovereign State and if no such plea of immunity from being sued in courts of other Sovereign State is raised, the foreign State shall be deemed to have waived such immunity and to have voluntarily submitted to the jurisdiction of the court of the other foreign State concerned. The conduct of Union of India during the time of proceedings was held amounting to voluntary submission to the jurisdiction of the Sikkim court and it was no longer permissible for it to raise the plea of sovereign immunity at the stage of arguments. Hence, it must be deemed to have waived the plea of immunity and therefore the suit was maintainable on its institution in 1972.

Thus, it is seen from the above cases that the question of limited submission without knowledge and extensive submission with knowledge has to be decided with reference to facts and circumstances of the case. However, by and large, the general judicial trend in India has been to give benefit of doubt against the plea of waiver in case of limited submission for the purpose of initial defence in a suit involving a foreign State. The object of Sec.86 is to save foreign State from being harassed by having to defend suits in the beginning itself, while assuming jurisdiction of the matter.

The foregoing discussion on the sovereign immunity in India reveals that the first legislative step modifying the absolute doctrine

failed to bring the desired effect. In contrast, it hindered the setting of a desirable legal climate to develop the restrictive theory which is more beneficial to the people as the doctrine of absolute immunity "has debilitating consequence on international trade and commerce or on international borrowings by the Governments, which for their effective operations, depend on prompt discharge of monetary obligations"[71]. Considering this, the courts in continental system extended sovereign immunity only to the sovereign non-commercial acts of foreign States. The courts in Anglo-American system which favoured initially the absolute theory of sovereign immunity had also deviated towards restrictive theory through interpretative techniques such as "nature" and "purpose" / "object" tests.

As the judicial interpretations failed to solve the problems completely, the States resorted to corrective steps through the process of codification.[72] Yet, the dilemma continues. The restrictive theory has not been rejected thoroughly, but more and more exception had been created to the application of absolute theory in the treaty formulation concerning sovereign immunity.[73]

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[71] S.K.Agrawala "The Plea of sovereign Immunity in Indian State Practice", in M.K. Nawaz, (ed). *Essays on International Law*, Indian Society of International Law, New Delhi, p.315.

[72] See evolution of codification process, *supra* Ch. IV.

[73] See for the detailed analysis of different techniques adopted in the codification, *supra* Ch. IV.

Against this backdrop, Indian law on sovereign immunity stays at the primitive level of legal development. Certain progressive judicial pronouncements were rendered by Supreme Court in *Harbhajan Singh Dhalla* v. *Union of India*[74]and Calcutta High Court in *New Central Jute Mills* v. *DSP Lines.*[75] But unfortunately these decisions had later been watered down by the recent pronouncement of Supreme Court in *DSP Lines* v. *New Central Jute Mill Co. Ltd.*[76]

An incisive analysis of the case decisions of Indian courts shows that the legislative provision in Sec.86 of Civil Procedure Code laying down consent procedure functioned as an "executive valve" capable of closing the access to courts in matters relating to sovereign immunity. Many a times, instead of allowing the person who intends to sue a foreign State, the Central Government played the role of a judge and adjudicator and concluded that "no *prime facie* case is made out". Consent is also denied despite the fact that the Supreme Court had taken a strong objection to this kind of attitude of Central Government. A positive change in the attitude of the Government is far from sight.

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[74] *supra n.*44.

[75] *supra.n* 42.

[76] *supra n.*45.

The Ministry of External Affairs which is the nodal point for the purpose of processing the application of consent, seemingly denies consent[77] on "political grounds", the term which did not convey any meaning even to the courts of India.

As of now the one and the only progressive development ever made by judiciary in this realm is insisting for a reasoned decision from the Central Government by mentioning the ground of denial of consent (a natural justice requirement). But in practice, whenever the natural justice requirement is not followed Supreme Court gives further direction to the Government to follow the principle of natural justice. It is submitted that the decision in *New Central Jute Mills* case[78] by the Calcutta High Court reflects the contemporary international law of sovereign immunity. Unfortunately, the statutory interpretation given by the Supreme Court in the appellate stage brought to an end an otherwise welcome beginning.

The problem with the sovereign immunity doctrine is that it inherently militates against several interests as observed by

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[77] The present author interviewed officials in Ministry of External Affairs dealing with the "consent" under Sec. 86 CPC for suing foreign States, in connection with collecting data relating to cases where consent was denied or granted. It was found that in 1993, 1994 and 1995 the number of requests for granting of consent which were turned down by MEA was respectively 4, 6, 6. However, in last couple of years permission to sue foreign States has been granted by MEA in matters like vacation of premises occupied on rent by embassies of Zaire, Morocco, Ireland, Tunisia, Iraq, Afghanistan and Syria; and permission has also been granted to sue Republic of Yemen for non-payment of medical bills by its Consulate General.

[78] *supra n.* 42.

Musmanno, J. of the Supreme Court of Pensylvania[79], thus:

> The sovereign immunity doctrine...is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighbourly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government towards chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery: a brazen repudiation of international moral principles, it is shameless fraud.

The preceding study unfailingly gives a stronger message that neither the executive nor the judiciary can protect the interest of the citizens against the legal dispute with foreign sovereigns as long as Sec.86 Civil Procedure remains in the statute book. it is submitted that the present situation cries for a legislation in India on the model of SIA, 1978 which constantly influenced the legislative efforts in Canada, Australia, South Africa and Pakistan.

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[79] Cited in S.K. Agrawalla, *op. cit. supra n.*71, at p.315.

CHAPTER VIII

CONCLUSIONS

Doctrine of sovereign immunity is the corollary of sovereignty, one of the fundamental principles of international relations and the law. The origin of this doctrine can be traced back to the centuries of state practice punctuated by treaties and writings of the publicists. An inquiry into the functional basis of this doctrine had led to the discovery of the theoretical foundations of this doctrine by the courts and the individual publicists of international law. By passage of time this doctrine had become customary international law and its application became indispensable in the conduct of foreign relations with states.

Until the beginning of nineteenth century, sovereign immunity had been viewed more as a personalised concept and decision as to who the sovereign was and the extent of immunity were determined by the executive. Twentieth century saw an increased intercourse of foreign sovereigns involving possessory, contractual and property rights resulting in litigations.

Municipal courts endowed with power to resolve these disputes in accordance with international law imparted decisions of diverse nature. The common law courts which long time perambulated within the traditional parameters extended the sovereign immunities to acts relating to the title of the sovereign over a property, things which are

notionally possessed by the sovereign, acts performed through his agents. Sovereign immunities were extended even to public ships and ships temporarily under the possession of the State. Emergence of other forms of Governments led to the immunities attributable to sovereign person transposed to the government and its instrumentalities.

The question as to which 'acts' of the foreign state is entitled to immunity which of its acts do not deserve sovereign immunity, prominently occupied judicial discourse in the decided cases in the courts of common law and continental countries.

Courts have taken either of the two views: absolute view or restricted view. According to the absolute view, irrespective of the circumstances of the subject matter sovereigns are entitled to arrest suit or resist execution. The restrictive view placed a limitation over the claims of immunity by foreign sovereign circumscribing its scope only in respect of government activity or property. It involved the courts to identify the acts of the government in two categories, namely, 'acts essentially governmental' and 'acts essentially commercial', and granting of immunity only to latter acts. The courts of United Kingdom are the traditional supporters of the absolute view. However, since the First World War there has been a strong tendency in favour of restrictive immunity in the judicial and governmental practice of the States. The same trend was reflected in the writings of the publicists.

The courts in the United Kingdom faced a dilemma in applying the restrictive theory in the cases of *Cristina* and *Porto Alexandre*. Finally, the restrictive immunity rule was adopted in 1977 in Philipine Admiral case. The United States courts also followed the British approach of absolute immunity till the issuance of Tate Letter in 1952, wherein the government's policy shifted to restrictive view. However, the courts have used a variety of techniques such as 'nature', 'purpose' and 'objective' tests for the purpose of identifying the commercial acts. As of today, there is no uniform rule for the determination of the commercial acts. After all, the value judgment which rests on political assumption relating to the proper sphere of the State authority and the priorities in State politics which contributed to the inconsistent decisions by different municipal courts, resulted in uncertainty of law in this field.

This led the common law courts and legislators to look to solutions offered by the continental system of law which enumerated exceptions to sovereign immunity in the form of written law. Incorporation of the best of common law and continental practices in the form of a code was thought to be indispensable to solve these complicated legal problems associated with sovereign immunities. The European Convention on Sovereign Immunities is the product of such a mission.

The American law of sovereign immunities which was nothing but British common law for all practical purposes till the issuance of Tate Letter, also felt the need for a codified law. The United States, while retaining the best of common law and its practice of executive suggestion decided to circumvent the ill-effects of outmoded and undesirable common law precedents by codification. The outcome of this process is the enactment of Foreign Sovereign Immunities Act (FSIA). United Kingdom, realizing the efficacy of codification enacted Sovereign Immunity Act (SIA).

The study of codification process dealt in Chapter IV, reveals that codification served the purpose of weeding out outmoded and undesirable precedents, although they at one point of time served well the purpose and later militated against the rights of citizens. Codification is found efficacious in retaining the best of principles which stood the test of time and also to equip with new principles to take care of future exigencies. The treatment of waiver in these codes would tell us how imaginative are the codifications. It can be seen from chapter IV that the law of sovereign immunities in certain sectors like "State owned vessels" covered under Brussels Convention, 1926 was kept outside the scope of national codification to avoid duplication.

However, multiplicity of diverse rules of sovereign immunity which bore the national character and the systemic influence continued to occupy the codes also. The post codification litigations in these

countries brought new legal problems to the fore, perplexing the legal minds in this field.

Codification in this area appears to be a continuous affair. The international codification process which was undertaken by the ILC makes clear the keenness of international community to embark upon a codification process. This inaugurated a new challenge of meaningful integration of the principles of sovereign immunity developed by major legal systems of the world, in such a way that it will be acceptable to majority of states. This draft has the best of principles drawn from every major legal system as explained in chapter IV. If the draft is adopted it would certainly be a significant contribution to the harmonization and development of the law of sovereign immunities.

It is interesting to note that the codification process began and continued only in common law countries. As stated elsewhere, the inherent difficulty of the precedent based system to accommodate new principles in response to new demands at a faster pace appears to be a strong reason for the perpetuity of anachronic and obsolete laws which are inimical to the rights of citizens.

Realizing these shortcomings, common law countries like Australia, Canada, South Africa and Singapore followed the statutory precedents set by the FSIA and SIA. In contrast, Indian situation is moving from better to worse.

Although India inherited the British common law, unlike in Britain, the Executive in India was given a choice to allow or avoid the application of British common law of sovereign immunity. This was done basically by creating a consent procedure in Civil Procedure Code. When executive grants consent to sue a foreign sovereign, the court can apply international law. Otherwise, no litigation is possible against a foreign sovereign.

Part III of this work explains that the provision was originally meant for safeguarding the interests of the Rulers of Indian States whom the executive recognised as sovereign. It was not meant for protecting the commercial acts of government or the governmental instrumentalities, as the sovereignty of the Princely States was not at all recognised. It is seemingly clear that the sovereign immunity extended to Rulers of Princely States was only a political concession. Moreover, the decision to give consent to sue the Princely States had been vested in the executive because the colonial executive had to exercise this provision for the application of a political decision and not as a legal decision. Unfortunately, the provision has been perpetuated through successive Civil Procedure Codes, even after Indian Princely States were integrated and Privy Purses were abolished. This led to many litigations even after the abolition of privy purses.

The status of law relating to sovereign immunity in India draws a bleak picture. The rules of British common law, which are nullified by

the SIA, are paradoxically made applicable in India. The executive decision to give consent to sue a foreign sovereign remains in the statute book. Indian citizens who sustain damage by the breach of contract of a foreign agency, or by a civil wrong of a foreign company today fail to have access to justice if the Ministry of External Affairs (MEA), which is a nodal point for giving consent under Sec. 86 of C.P.C., certifies that the company is a foreign sovereign and consent is denied. This decision cannot even be questioned on the basis of constitutional rights. The Government of India acting through MEA on consent process very often denies consent by a single line statement that "no *prima facie* case is made out" or "consent is not given on political grounds".

Surprisingly enough the cases where consent had been denied include: refusal to vacate rented premises, non-payment of rent, breach of contract – all matters which have nothing to do with sovereign acts by any stretch of imagination.

Sec. 86 of CPC which empowers the Central Government to refuse consent does not stand the test of contemporary administrative law as it does not provide for any appeal. Even if consent is given, this does not assure any remedy against the commercial acts of foreign sovereign as the Indian Courts apply the British precedents such as *Baccus S.R.L.* v. *Servicio Nacional del Trigo*; *Krajina* v. *Tass Agency* which have been emasculated in effect, by the legislative interference

in Britain. There are, no doubt, some progressive decisions by the High Courts of Calcutta and Bombay, which subscribed to the idea of restrictive view. But unfortunately they were overruled by the Supreme Court by outmoded and inappropriate judicial precedents of yesteryears as explained in chapter VII.

If at all any progress is made, it was the court's infusion of natural justice principle in the consent process that the order refusing consent must be expressed in such a manner that reasons can be spelt out from such decisions. It is also essential now that the administrative Ministry, which is empowered to give or deny consent, should accord fair and proper hearing to persons on relevant material facts.

But what is happening really is that the application seeking consent from Central Government to sue the foreign sovereign is not expeditiously disposed off. The applicants to activate this process, very often have to knock the doors of the court. Even after the authorities are being directed by the court, the Government seems to be lethargic or denying consent to sue on "fanciful and vague grounds".

The study of jurisprudence of the courts, thus, gives an idea that the first ever legislative step taken in India through C.P.C. empowering the executive to give or deny consent worked to the detriment of the rights of Indian citizens, although the intention to empower the

executive was the other way round. The courts became helpless to stop this evil. Conversely, they applied the British common law of old vantage and perpetuated the absolute view. As a result of this the Indian law of sovereign immunity stays at the primitive level of legal development comparable to old British common law which supported the theory of absolute immunity.

The common law countries, which encountered similar problems in the recent past, had embarked on a codification exercise to orient their laws in accordance with their national requirements. Pakistan which had a provision similar to Section 86 Civil Procedure Code had adopted a statutory instrument on the lines of British SIA. The recently adopted ILC draft articles on sovereign immunity could well serve as a basic document to study the contemporary thinking in international law relating to sovereign immunity.

For the foregoing reasons it is submitted that it is high time India begins a codification process on the lines of British SIA. Section 86 of C.P.C., which provided room for executive arrogance of power could be eliminated by repealing this section. But the effect of such a repealment would result in the absence of legislation in this matter. Of course, the citizens would have a great relief from the executive repression and harassment. Yet, it may not guarantee them any help from judiciary in matters of immunity of a foreign sovereign since the judiciary cannot come out on its own of the quick-sand of old British

common law precedents. It is submitted further that a statute resulting from a careful codification alone would help in achieving a just balance between the political interest of the State and rights of its citizens.

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